THE ATTORNEY GENERAL'S REFUSAL TO PROVIDE CONGRESSIONAL ACCESS TO "PRIVILEGED" INSLAW DOCUMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

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WEDNESDAY, DECEMBER 5, 1990

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2141, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Lawrence J. Smith, Harley O. Staggers, Jr., Don Edwards, Mike Synar, Hamilton Fish, Jr., Carlos J. Moorhead, and Tom Campbell.

Subcommittee staff present: George P. Slover, counsel; Mary V. Heuer, research assistant; Linda Jo Shelton, office manager; and Deloris Cole, clerk; full committee staff present: William M. Jones, general counsel; James E. Lewin, chief investigator; Cynthia Meadow, counsel; Alan F. Coffey, minority chief counsel; and Peter J. Levinson, minority counsel, Committee on the Judiciary.

Also present: Don Fulwider and Ned Friece, GAO detailees.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. BROOKS. The subcommittee will come to order.

Today's hearing has been called to review the Attorney General's decision to deny the committee access to critical documents involving the Justice Department's dispute with the INSLAW Corp. The documents were requested as part of an ongoing investigation of allegations that high-level Department officials conspired to force INSLAW into bankruptcy and liquidate its assets. Further, it has been alleged that these officials also attempted to arrange to have the company's primary software product, called PROMIS, transferred or bought by a rival company.

As incredible as this sounds, Federal Bankruptcy Judge George Bason, who will be testifying later, has already found much of the first part of the allegation to be true. In his decision on the INSLAW bankruptcy, Judge Bason ruled that the Department "took, converted, and stole" INSLAW's proprietary software using "trickery, fraud, and deceit." The judge also severely criticized the decision by high-level Department officials to "ignore the ethical improprieties" on the part of the Justice Department officials involved in the case.

In November 1989, Senior District Court Judge William B. Bryant unequivocally supported Judge Bason's findings and criticized the Department for attempting to escape accountability by asserting, among other things, "sovereign immunity," whatever that is. I didn't think we had kings in this country.

Despite the dramatic findings by the two courts, the Department has steadfastly denied any wrongdoing by its officials, claiming that its conflict with INSLAW is nothing more than a simple contract dispute. I find this position a little hard to swallow.

INSLAW encountered problems with the Department over relatively minor contracting issues almost immediately after receiving its contract in 1982. Inexplicably, the contract problems ballooned into a major controversy involving the highest levels of the Justice Department, including at least two assistant attorneys general, a deputy attorney general, and Attorney General Meese himself. After 8 years and several court cases, the issues remain unresolved. Undoubtedly, hundreds of thousands, if not millions, of dollars have been spent on litigation. More importantly, the Department's ADP modernization program has been set back at least 10 years.

Unfortunately, the Department has thwarted attempts by Congress to learn the complete truth concerning the INSLAW case. Justice has repeatedly denied both the House and Senate investigating committees access to critical documents that may prove the Department's innocence or guilt. As a result, I am even more convinced that the allegations concerning INSLAW must be fully and independently investigated by the committee. However, we can't proceed very well with our investigation until we resolve the current access problems with the Attorney General.

Today, we will have the opportunity to discuss with the House counsel, Steve Ross, and his deputy, Charles Tiefer, the options we have available to compel production of the requested materials. We will also be hearing from witnesses representing the INSLAW Corp. and, as I mentioned earlier, Judge Bason; and, finally, I have asked Milt Socolar, Special Assistant to the Comptroller General, to present the results of the GAO audit I requested of the Department's overall ADP management and operation, and, believe me, it is not a pretty picture.

Did you have an opening statement, Mr. Fish?

Mr. FISH. I do, Mr. Chairman.

Mr. BROOKS. The gentleman is recognized.

Mr. FISH. Thank you, Mr. Chairman.

Since the summer of 1989, employees of the General Accounting Office—detailed to the Judiciary Committee—have been investigating the Justice Department's automated data processing procurement practices. The GAO personnel have been operating under the direction of the chairman of this committee and his investigative staff. A major focus of the investigation has involved exploring allegations of improper conduct by employees of the Department in connection with the INSLAW matter. INSLAW at one time supplied software for a case management system to the Justice Department.

This morning, we will hear from INSLAW's president, William Hamilton, and vice president for administration, Nancy Hamilton, and two attorneys who represent INSLAW, Elliot Richardson and

Charles Work. Elliot Richardson is well known not only to Members of Congress but to millions of Americans for his many years of outstanding public service.

We will also hear form Judge George Bason, who heard the INSLAW case in the Bankruptcy Court. Steven R. Ross, general counsel to the Clerk of the House, will offer his legal perspective regarding congressional access to executive branch documents. He is accompanied by Charles Tiefer, his deputy general counsel. Finally, Milton Socolar, special assistant to the Comptroller General, will testify on ADP management problems at the Department of Justice.

Regrettably, we will not have the opportunity today to hear from the Department of Justice. Since this is the initial hearing on a complicated and difficult matter, it would be premature for us to arrive at any conclusions on the legal merits of the Department of Justice's assertion of privilege, particularly in the absence of any testimony from a Department of Justice witness.

Because no representative of the Department of Justice is appearing, I do want to acknowledge the fact that the Department has cooperated greatly over a long period of time in facilitating many aspects of this investigation. DOJ arranged for over 50 employee interviews, furnished voluminous written materials, and provided a convenient room for the use of the investigators, to cite only some of the examples of their efforts to provide assistance.

Mr. Chairman, I ask unanimous consent at this point, so as not to have to read it, to insert in the record a letter to me from the Office of Legislative Affairs of the Department of Justice, dated December 4, which details their efforts to facilitate this inquiry and also offers to brief the committee on their position on withholding the litigation work product.

Mr. BROOKS. Without objection, it will be included in the record.

[See app. 1, p. 163.]

Mr. FISH. The members of our subcommittee, it must be noted, generally are unfamiliar with the details of this investigation despite its length. We approach these issues without the benefit of the extensive knowledge the GAO investigators and the majority investigative staff have accumulated. I hope, Mr. Chairman, that our subcommittee will have the opportunity early in the 102nd Congress to hear in closed session from the GAO investigators. We, of course, cannot intelligently vote on the possible issuance of a subpoena, if we reach that stage, without knowing why litigation-related documents DOJ believes to be privileged are indeed needed by this committee.

Thank you.

Mr. BROOKS. This morning, we begin the hearing with a panel of four. William Hamilton is chief executive officer of INSLAW and one of the founders of its predecessor company, the Institute for Law and Social Research. He was project manager for development of the PROMIS legal case management software. He is accompanied by his wife, Nancy B. Hamilton, vice president for administration of INSLAW.

Appearing with Mr. Hamilton is Mr. Elliot L. Richardson, who is the senior resident partner in the Washington office of Milbank, Tweed, Hadley, & McCloy, the law firm representing INSLAW. As

everyone knows, Mr. Richardson's national public service record is extraordinary. His diplomatic roles include Ambassador to the Court of St. James; and he has had the distinction of serving as the head of four Cabinet-level departments: the Departments of Justice; Commerce; Defense; and Health, Education, and Welfare.

The final panel member is Mr. Charles R. Work, counsel to Mr. and Mrs. Hamilton, and the partner in charge of the Washington office of McDermott, Will & Emory.

It is a pleasure to have you all with us this morning. The prepared statements of Mr. and Mrs. Hamilton and Mr. Richardson will be made part of the record, in full. I would hope you would limit your summary to 5 minutes, and I would recognize Mr. Ambassador first.

Mr. Richardson.

STATEMENT OF ELLIOT L. RICHARDSON, MILBANK, TWEED, HADLEY & McCLOY, WASHINGTON, DC, ACCOMPANIED BY CHARLES R. WORK, McDERMOTT, WILL & EMORY, WASHINGTON, DC

Mr. RICHARDSON. Thank you very much, Mr. Chairman and members of the subcommittee.

I look back with great pride and pleasure, Mr. Chairman, on the occasions, over a very long period of time, in which I have appeared in this committee room, and I particularly appreciate your very kind words of introduction. Mr. and Mrs. Hamilton and Mr. Work and I are all grateful to the subcommittee for this opportunity to appear before you today to testify regarding the INSLAW case.

My involvement with INSLAW goes back to 1973, when I became Attorney General of the United States. I came to the Department of Justice with a deep interest in the problems of the administration of justice. I wanted to determine what was being done at the Federal level to try to improve it, and it was at this time that I first became aware of the work of the Institute for Law and Social Research, founded by the Hamiltons and generally known by the acronym INSLAW.

With the help of LEAA grants, INSLAW was developing case management software called the Prosecutor's Management Information System, or PROMIS. By the end of the 1970's, PROMIS was being used in district attorney's offices in large metropolitan areas throughout the United States and on a pilot basis in two large U.S. attorneys' offices.

In 1980, President Carter and the then Attorney General decided that the Law Enforcement Assistance Administration should be terminated. This prospect gave rise to concern on the part of the users of PROMIS that they would continue to get service and support, and so the Hamiltons decided that there should be created a for-profit corporation known as INSLAW, Inc., and I was recruited, as a member of the board of trustees of the old nonprofit corporation in order to help assure a fair negotiation of the transfer of the assets from the old corporation, the nonprofit one, to the new for-profit corporation.

Shortly after that transfer of assets occurred—that is, between January 1981 and March 1982, the new INSLAW developed a substantially enhanced version of PROMIS which has since been further improved. The old PROMIS, developed with Government funding, was and is in the public domain. The new PROMIS, developed with the private funds of the new corporation, is proprietary, and it remains true to this day that no other software performs the function of case management as well as it is performed by PROMIS.

In March 1982, INSLAW, as you have noted previously, Mr. Chairman, entered into a 3-year, $10 million contract with the Department of Justice to introduce the public domain version of PROMIS into the U.S. attorneys' offices. Claiming that INSLAW had no title to the enhanced version of PROMIS, DOJ officials threatened to withhold payments under the contract unless and until INSLAW turned it over to DOJ.

On the advice of its own procurement counsel, however, the Department modified its contract with INSLAW in April 1983 and agreed to pay license fees to INSLAW if and when DOJ decided to use the enhanced version of PROMIS in the U.S. attorneys' offices.

Then, Mr. Chairman, in May 1983, began a series of contract disputes with INSLAW. These at first seemed capable of resolution by mutual understanding and a reasonable amount of goodwill, but when the disputes dragged on without resolution, I volunteered to see what I could do to clear them up, and they still persisted, and so, at about that point, I began to serve as counsel for the new, for-profit corporation.

By then, the Department of Justice was withholding substantial amounts of money from INSLAW under the contract. In February 1985, the Department owed INSLAW some $2 million, and, being unable to pay its creditors, INSLAW was forced into bankruptcy under chapter 11.

Meetings with the Department went forward thereafter, still in the hope of finding reasonable solutions, but I was forced, along with the Hamiltons and other counsel, to conclude by the end of 1985 that further discussion with the Department was fruitless. When I finally received a letter from the then Deputy Attorney General Lowell Jensen, in effect, giving the back of his hand to what I believed to be a reasonable approach and totally disregarding the factual substance of what I said, I was forced to the reluctant conclusion that further meetings were not likely to be fruitful and that, to protect its interests, INSLAW had no choice but to file suit against the Department of Justice. This INSLAW did in June 1986, in the U.S. Bankruptcy Court for the District of Columbia.

The suit was tried in the summer of 1987, and in January 1988 the Bankruptcy Court rendered judgments in favor of INSLAW in the amount of $6.8 million, plus counsel fees. The most important of the court's findings was that—"DOJ officials took, converted, stole 44 copies of INSLAW's proprietary PROMIS case management software through trickery, fraud, and deceit."

In November 1989, the District Court for the District of Columbia affirmed all the findings of the Bankruptcy Court. In an accompanying memorandum, the District Court stated that, "after careful review of all the volumes of transcripts of the hearings before the

bankruptcy court, the more than 1,200 pages of briefs and supporting appendices, and all other relevant documents in the record, there is convincing, perhaps compelling, support for the findings set forth by the bankruptcy court." The court—that is, the District Court—also found it "strikingly apparent...that INSLAW performed its contract in a hostile environment that extended from the higher echelons of the Justice Department to the officials who had the day-to-day responsibility for supervising its work."

But, Mr. Chairman, even after these findings, it was not possible fully to account for what had happened. The combination of high-level hostility and lower-level vindictiveness did not adequately explain the persistence and tenacity of the attempts to wrest control of PROMIS from INSLAW. These began with the Department's refusal to recognize INSLAW's ownership of enhanced PROMIS. That denial of recognition of INSLAW's proprietary interest was followed by an offer from a company called Hadron, Inc. Hadron was a software company controlled by a long-time friend of Attorney General Edwin Meese named Earl Brian. When William Hamilton refused this offer to take over INSLAW, the chairman of Hadron said, "We have ways of making you sell."

Soon thereafter, a New York-based venture capital firm, following a meeting with a businessman who claimed to have access to the highest levels of the Reagan administration, tried to induce the Hamiltons to turn over to the firm their voting rights in INSLAW's common stock. When the contract disputes forced INSLAW to seek the protection of chapter 11, the Department attempted to push INSLAW into liquidation. After this failed, DOJ officials encouraged a Pennsylvania-based computer services company to launch a hostile takeover bid for INSLAW.

We believe, Mr. Chairman, that these attempts to acquire control of PROMIS were linked by a conspiracy among friends of Attorney General Edwin Meese to take advantage of their relationship with him for the purposes of obtaining a lucrative contract for the automation of all the Department's litigating divisions. Mr. and Mrs. Hamilton will, following my testimony, outline the facts pointing to the existence of this conspiracy.

When Edwin Meese became Attorney General in February 1985, he and Lowell Jensen took steps to meet the Department's long-recognized need for comprehensive case management systems. A request for proposals was announced in May 1986. The cost estimates for this procurement, code-named Project EAGLE, exceeded $200 million, and options could have raised the total to three or four times that amount.

The request for proposals—and this is is a very significant fact—contained no provision for the acquisition or development of case management software, which would have to be a key component of the Department's automated system. In fact, undisclosed provisions of the procurement did mandate technical specifications which could only be met by the use of PROMIS. The only possible explanation, therefore, for the failure to seek the acquisition of a case management system is that the winner of the Project EAGLE would be an entity which already controlled such software; i.e., PROMIS.

In February 1988, William and Nancy Hamilton submitted to the Public Integrity Section of the Department——

Mr. BROOKS. Could you desist just a moment? I did not swear you in as you started, but I know that you would not object to that, and I wish to now, in the process, to affect all of your testimony. Would you raise your right hand and swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. RICHARDSON. Yes, sir.

Mr. BROOKS. And would the other witnesses—Mr. and Mrs. Hamilton and Mr. Work—do the same thing?

[Witnesses sworn.]

Mr. RICHARDSON. Could that be deemed retroactive to the beginning of my testimony?

Mr. BROOKS. Well, part of it is retroactive. For you, part of it is retroactive, but we have great faith in you.

Mr. RICHARDSON. The other thing I neglected to do, Mr. Chairman, was to ask your permission to have my whole statement included.

Mr. BROOKS. We just don't want the Justice Department to say, "Oh, you were just down there talking for a client," you know.

Mr. RICHARDSON. Well, I would like to interrupt my testimony to say that I got into this, as I told you, because of my interest in the administration of justice and the management of the Justice Department, not to mention my belief that, if there is any Department of the Government of the United States that should not only be administered with integrity but communicate that integrity to the public, it is the Department of Justice, and the story we are telling you here today, Mr. Chairman, is indicative of the conclusion that that integrity has been betrayed.

Mr. FISH. Mr. Chairman.

Mr. BROOKS. Mr. Fish.

Mr. FISH. Mr. Chairman, I just would like to say to my friend, Ambassador Richardson, that it was not I who requested that he be put under oath, and he would be the last person in the United States whose opinions and views I would not respect without the necessity for putting under oath.

Mr. RICHARDSON. Thank you very much, Mr. Fish.

Mr. BROOKS. It is I, Mr. Richardson. I'm the one.

Mr. RICHARDSON. Well, I don't blame you.

Mr. BROOKS. It doesn't hurt anything.

Mr. RICHARDSON. I don't wish to be treated with any special deference. I am here as a concerned citizen; I have no other standing.

I would like, however, to have the whole of my statement inserted in the record. I am skipping quite a lot.

Mr. BROOKS. The full statement will be inserted in the record. It was originally, and you are giving a summary now, as we deeply appreciate.

Mr. RICHARDSON. Thank you, Mr. Chairman. Well, things came to the point where, since the findings in the Bankruptcy Court could not fully explain the relentlessness of the effort to take over the PROMIS software, the Hamiltons began to put together all the indications of a larger conspiracy, and they submitted a written statement to the Public Integrity Section of the Department in February 1988, and they will tell more about that.

The section promised to investigate these allegations, and more than a year later, in July 1989, they eventually gave INSLAW a letter saying that the investigation "has been completed, and prosecution has been declined due to lack of evidence of criminality."

We followed this up last December by submitting to the Department the names of witnesses who had furnished the information on which these allegations are based and pointing out that the Department had not interrogated any of them. Moreover, to the best of our knowledge—that is, they had interrogated only one. To the best of our knowledge, moreover, the Department has not attempted to obtain relevant documents and has not followed up the leads called to the attention of the Attorney General in my letter to him of May 11, 1989, which I would like to have inserted in the record, with your permission, Mr. Chairman.

[See app. 2.]

Mr. RICHARDSON. The Department of Justice—and these are my concluding observations—has a clear duty, under the Constitution and laws of the United States, to take care that the laws are faithfully executed. That is, of course, axiomatic. By failing and refusing to conduct a sufficient investigation into this matter, as indicated by the fact that they talked to only one out of 30 witnesses on whose testimony we base our allegations, the Department has breached and neglected these duties in a manner that cannot be reasonably defended.

In my judgment, the Bankruptcy Court findings alone should have spurred the Department to take swift corrective action. The Department's decision to forego and refuse a serious investigation into the Bankruptcy Court's findings and INSLAW's additional charges reflects the direct and irreconcilable conflict of interest which plagues the Department's exercise of its investigative and prosecutorial functions in this matter. INSLAW's allegations are more than sufficient to call upon the Department to fulfill its responsibilities toward the firm and impartial enforcement of the criminal laws and the fair assessment of INSLAW's claims.

Why hasn't the Department conducted a comprehensive, thorough, and hard-hitting investigation? One explanation is that a comprehensive investigation would only expose widely ramified criminal conduct on the part of departmental employees, could also make the Department liable for punitive and consequential damages much larger than the $6.8 million already awarded. The less the Department knew of the facts, the more easily it could rationalize the nonperformance of duty and minimize those risks. The Department could not completely duck an investigation, but it might get away with a superficial one. Taking that chance, the Public Integrity Section of the Criminal Division initiated a cursory review of INSLAW's charges but made no serious attempt to determine their validity.

INSLAW does not, I should like to emphasize, contend that the facts it has assembled are sufficient, by themselves, to prove a criminal conspiracy. We do contend, however, that these facts, coupled with the Bankruptcy Court's findings, create an imperative need for a thorough, hard-hitting, and impartial investigation. Had the Department done no more than match INSLAW's own investigative efforts, it would have identified the same individuals

INSLAW identified and obtained the same information that INSLAW obtained.

Because the Department refused to investigate INSLAW's allegations, INSLAW, at my suggestion, filed a petition for a writ of mandamus in the Federal District Court for the District of Columbia, requesting that the court order a full and thorough investigation of INSLAW's allegations. Although Judge Bryant denied the petition for a writ of mandamus on the ground that INSLAW lacked standing and on the ground that prosecutorial discretion is unreviewable, he did, in a footnote, make the following statement: "Importantly, the House Judiciary Committee is presently investigating the activities of the Department and its then officials, employees, and friends as to the existence of a conspiracy of the type and magnitude alleged by INSLAW. Clearly, this House committee is a body far better placed in the governmental scheme of things than the court [with resources unmatched in the Judiciary] to undertake such an evaluation."

Mr. Chairman, there is an inscription in the rotunda outside the office of the Attorney General of the United States. This inscription says, "The United States wins its point whenever justice is done its citizens in the courts." The Justice Department has chosen to ignore this principle. The Congress of the United States must remind the Justice Department that these are not just words inscribed in the rotunda to impress visitors but, rather, words that express a covenant between the Government and the American people.

That concludes my prepared statement, Mr. Chairman. I would be happy to respond to questions, but perhaps they should await the statement of Mr. Hamilton.

Mr. BROOKS. Thank you very much.

[Mr. Richardson's prepared statement follows:]

STATEMENT OF ELLIOT L. RICHARDSON

Mr. Chairman,

Mr. Chairman, we thank you and the Subcommittee for the opportunity to appear today to testify regarding the INSLAW case. Accompanying me are William A. and Nancy B. Hamilton of INSLAW and Charles R. Work, a partner at McDermott, Will & Emery, who is also counsel to INSLAW.

I first became aware of the work of INSLAW during my service in the Department of Justice in 1973. I came to the Department with a deep interest in the problems of the administration of justice. I wanted to determine what was being done at the Federal level to try to improve not only the management of the Department's caseload, but also to improve the collection of data and to analyze interrelationships of various components of the judicial system. The Institute for Law and Social Research ("INSLAW") had just been founded as a non-profit corporation and was conducting significant work in this area for state and local governments with the support of the Law Enforcement Assistance Administration ("LEAA"), a division of the Department.

With the help of LEAA grants, INSLAW developed case management software called the Prosecutor's Management Information System ("PROMIS"). PROMIS was

then being used in District Attorneys' Offices in large metropolitan areas throughout the United States and on a pilot basis in two large U.S. Attorneys' Offices.

Congress decided in 1980 to terminate the LEAA. So as to make possible the continuation both of service to PROMIS users and the funding of improvements in the software, the Hamiltons founded in January, 1981 a for-profit corporation known as INSLAW, Inc.

It was at this time that I became more directly involved with INSLAW. An old friend, Roderick Hills, who had been doing some legal work for INSLAW, asked me to chair the Board of Trustees of INSLAW, Inc.'s not-for-profit predecessor. The new corporation wished to acquire from the non-profit corporation substantially all of its assets, except for PROMIS itself, which was in the public domain. Harry McPherson and Calvin Collier also agreed to serve as trustees.

Serving in this capacity rekindled my interest in what INSLAW had accomplished; it was obvious that INSLAW was making an important contribution to the administration of justice. Starting here in the District of Columbia, it had done pioneering work on problems having to do with attrition of the criminal case load, problems of recidivism and repeated crimes by individuals whom we now identify as "career criminals." Indeed, the very concept of the "career criminal" grew out of INSLAW's analyses of data. The data further assisted in the development of

programs to improve the plight of victims and witnesses as well as the training of police officers.

Between January, 1981 and March, 1982 the new INSLAW developed a substantially enhanced version of PROMIS, which has since been further improved. This version of PROMIS is proprietary. No other software performs the function of case management as well as it is performed by PROMIS.

In March, 1982, INSLAW entered into a three-year, $10 million contract with DOJ to introduce the public-domain version of PROMIS into the United States Attorneys' Offices. Claiming that INSLAW had no title to the enhanced version of PROMIS, DOJ officials threatened to withhold payments under the contract unless INSLAW turned it over to DOJ. On the advice of its own procurement counsel, DOJ modified its contract with INSLAW in April, 1983 and agreed to pay license fees to INSLAW if and when DOJ decided to use the enhanced version of PROMIS in the U.S. Attorneys' Offices.

In May 1983, DOJ officials initiated a series of contract disputes with INSLAW. I began to act as INSLAW's attorney when Mr. Hamilton asked me to assist him because the Justice Department, for no understandable reason, was withholding substantial amounts of money from INSLAW in connection with these disputes. This inexplicable withholding of funds, coupled with my understanding that

the project manager for the U.S. Attorney's contract had been fired by INSLAW, made me feel that INSLAW must be confronting a situation that could not be explained by any ordinary circumstance of government administration. I thought that it was important, in this situation, to try to find a level in the Department at which there could be some assurance, or hope, that the matter would be dealt with objectively and on the merits. In that connection, I dealt over the next three years with a number of Justice Department officials at a number of different levels.

My efforts over this period were to no avail and by February, 1985, DOJ had withheld nearly $2 million owed to INSLAW, thus forcing INSLAW to seek Chapter 11 protection in the Bankruptcy Court for the District of Columbia. Finally, in 1985, after attending numerous meetings on behalf of INSLAW, including meetings with then Deputy Attorney General Lowell Jensen, I arrived most reluctantly at the conclusion that further meetings were not likely to be fruitful and that INSLAW , to protect its interests, had no choice but to file suit. This INSLAW did in June 1986 in the United States Bankruptcy Court for the District of Columbia.

In its complaint, INSLAW charged DOJ with violations of the automatic stay entered on February 7, 1985, including, inter alia, the assertion of control over INSLAW's proprietary version of PROMIS and the failure to take positive steps to curb the persistent efforts of certain DOJ officials to inflict harm on INSLAW. The suit was tried in the summer of 1987. On January 25, 1988, the Bankruptcy Court

rendered judgments in favor of INSLAW in the amount of $6.8 million plus counsel fees. The Court's principal findings are attached hereto as Exhibit A. The most important of these was that DOJ officials "took, converted, stole" 44 copies of INSLAW's proprietary PROMIS case management software "through trickery, fraud and deceit." The Court also found that DOJ intentionally and willfully sought to cause the conversion of INSLAW's Chapter 11 reorganization case to a Chapter 7 liquidation case "without justification and by improper means." Additionally, the court ruled that DOJ officials, acting on a decision "consciously made at the highest level" ignored "serious questions of ethical impropriety."

On November 22, 1989, the District Court affirmed the Bankruptcy Court's judgments. In an accompanying memorandum, the District Court stated that "after careful review of all of the volumes of transcripts of the hearings before the bankruptcy court, the more than 1,200 pages of briefs and supporting appendices and all other relevant documents in the record, there is convincing, perhaps compelling support for the findings set forth by the bankruptcy court." The court also found it "strikingly apparent . . . that INSLAW performed its contract in a hostile environment that extended from the higher echelons of the Justice Department to the officials who had the day-to-day responsibility for supervising its work." Even the undisputed facts, the court added, compelled "the same conclusion reached by the bankruptcy court; the government acted willfully and fraudulently to obtain property that it was not entitled to under the contract."

But the combination of high-level hostility and lower-level vindictiveness could not sufficiently account for the persistence and tenacity of the attempts to wrest control of PROMIS from INSLAW. These began with DOJ's refusal to recognize INSLAW's ownership of enhanced PROMIS. Then came an offer from Hadron, Inc., a software company controlled by a long-time friend of Edwin Meese, to buy INSLAW. When Hamilton refused the offer, the chairman of Hadron said, "We have ways of making you sell." Soon thereafter a New York-based venture capital firm, following a meeting with a businessman who claimed to have access to the highest levels of the Reagan Administration, tried to induce the Hamiltons to turn over to the firm their voting rights in INSLAW's common stock. When the contract disputes forced INSLAW to seek the protection of Chapter 11, DOJ attempted to push INSLAW into liquidation. After this failed, DOJ officials encouraged a Pennsylvania-based computer services company to launch a hostile takeover bid for INSLAW.

We believe that these attempts to acquire control of PROMIS were linked by a conspiracy among friends of Attorney General Edwin Meese to take advantage of their relationship with him for the purpose of obtaining a lucrative contract for the automation of the Department's litigating divisions. Among the facts pointing to the existence of this conspiracy are the following:

(a) Between 1958 and 1966, Edwin Meese and D. Lowell

Jensen served together in the Alameda County, California, District Attorney's office. From 1966 to 1974, Meese was a key aide to Governor Ronald Reagan. From 1970 to 1975 , Dr. Earl Brian served in Governor Reagan's Cabinet. In January 1981, Meese became Counsellor to President Reagan. In 1981 and 1982, Brian served in the White house as the Chairman of a task force which reported to Mr. Meese.

(b) When Meese jolned the Reagan Administration, Brian was the controlling shareholder in Biotech Capital Corporation. Biotech controlled Hadron, Inc., a company which specialized in integrating computer-based information management systems. This was the company which tried to buy INSLAW.

(c) Mrs. Meese bought stock in Biotech's first public offering with money borrowed from Edwin Thomas, soon to be an aide to her husband. Brian lent Thomas $100,000 for the purchase of a house in Washington. Mrs. Meese later bought stock in American Cytogenetics, another Brian company.

(d) In June, 1983, a DOJ "whistleblower" warned the staff of Senator Max Baucus that, as soon as Meese became Attorney General, unidentified friends of Meese would be awarded a "massive sweetheart contract" to install PROMIS in every litigation office of DOJ. According to a statement made to Judge Jane Solomon of the Civil Court of the City of New York, Stanton's attempt to force INSLAW into liquidation was part of a "conspiracy to get the INSLAW software." Several high-level DOJ officials spoke of DOJ's determination to "get" or "bury" INSLAW. One DOJ employee said that Jensen was behind this effort. A second attributed the award to Hadron of a $40 million computer services contract for litigation support in the Lands Division to the influence of a Deputy Assistant Attorney General with close ties to Meese. Other DOJ employees connected Meese, Brian, and Hadron with the harassment of INSLAW and the attempt to acquire PROMIS.

When Meese became Attorney General in February 1985, he and Jensen took steps to meet DOJ's long-recognized need for comprehensive case-

management systems. A request for proposals was announced on May 25, 1986. The initial cost estimates for this procurement, code-named "Project EAGLE," exceeded $200 million; options to expand the contract could increase the cost to three or four times this amount. The request for proposals contained no provision for the acquisition or development of case-management software. The Project EAGLE computers would be largely wasted without this software. Undisclosed provisions of the Project EAGLE procurement did in fact mandate technical specifications for the use of PROMIS. DOJ's failure to publish a specific requirement for case-management software implied an understanding that the winner of the Project EAGLE contract would be an entity which already controlled such software, i.e., PROMIS.

In late April, 1988, Ronald LeGrand, Chief Investigator of the Senate Judiciary Committee, telephoned Hamilton. LeGrand said that he was calling at the request of an unnamed senior official in DOJ whom he had known for 15 years and regarded as completely trustworthy. According to this official, the INSLAW case was "a lot dirtier for the Department of Justice than Watergate had been, both in its breadth and depth." The official asked LeGrand to inform the Hamiltons that the Justice Department had been compromised on the INSLAW case at every level, and that Jensen had engineered INSLAW's problems right from the start. The official also said that senior career officials in the Criminal Division knew all about this malfeasance but would not disclose what they knew except in response to a

subpoena and under oath. LeGrand has since told the Hamiltons and others that his informant would come forward only if assured of protection against reprisal.

DOJ is aware of most of these facts. Some are set forth in the Bankruptcy Court's findings of fact; some are contained in a written statement furnished to the Public Integrity Section of DOJ's Criminal Division (the "Section") in February, 1988 by William and Nancy Hamilton; many are recapitulated and supplemented in my letter of May 11, 1989 to Attorney General Thornburgh, which is appended hereto as Exhibit B.

On May 4, 1988, the Section informed INSLAW that it would investigate some of the allegations made by the Hamiltons and their counsel. On July 18, 1989, the Section notified INSLAW that its investigation of INSLAW's allegations "has been completed and that prosecution has been declined, due to lack of evidence of criminality." The Section had not, in fact, conducted a comprehensive, thorough, or credible investigation.

Last December, INSLAW contacted each of the 30 individuals who have furnished information on which these allegations are based. Each was asked whether or not anyone representing DOJ had communicated or attempted to communicate with her or him. The only one who responded affirmatively is Judge Jane Solomon. On December 11, 1989, LeGrand told INSLAW that DOJ had not to

that date, made any attempt to obtain from him the identity of his informant. Although William Hamilton's detailed recollections of past events and conversations have frequently been corroborated by later-discovered documents or subsequent testimony, DOJ has never sought to interview him. To the best of our knowledge, DOJ has not attempted to obtain relevant documents, correspondence, notes, appointment calendars, or telephone logs from any of the individuals or entities identified in the Hamiltons' statement to the Section and has ignored the leads called to its attention in my letter of May 11, 1989.

The Department of Justice has a clear duty under the Constitution and laws of the United States to take care that the laws are faithfully executed. This duty embraces responsibilities both to enforce the criminal laws and to conduct civil litigation fairly. DOJ's duty to enforce the criminal laws obliges them, whenever they initiate an investigation of wrongdoing, to pursue the evidence as far as may be necessary to make a proper determination as to the course of action thereby indicated. DOJ's duty of fairness toward citizens with whom they are engaged in litigation requires them to develop a full and fair record and to refrain from instituting or continuing litigation that is demonstrably unfair. By failing and refusing to conduct a sufficient investigation in this matter, DOJ has breached and neglected these duties in a manner that cannot reasonably be defended.

The Department's failure and refusal to conduct an adequate criminal

investigation or to examine conscientiously the merits of INSLAW's contract claims has forced INSLAW to retain lawyers and private investigators and to expend countless hours of its staff's time in an effort to discover information that would have been obtained by DOJ if they had properly performed their duties.

While neglecting to investigate its own wrongdoing, the Department sought and obtained court authority for the government to audit, for the eighth time, INSLAW's performance under the PROMIS contract. This redundant audit has diverted the time and energy of INSLAW's management from the effort to rebuild the company and has forced INSLAW to incur significant additional legal and accounting expenses.

INSLAW has exhausted all the available administrative means of inducing the Department to conduct a fair and thorough investigation. INSLAW requested the appointment of an Independent Counsel pursuant to the Ethics in Government Act; this request was denied on May 4, 1988. INSLAW's attempt to stimulate the Public Integrity Section to take appropriate action ended with the Section's letter of July 18, 1989 declining prosecution. INSLAW's counsel wrote the Department on August 10, 1989 calling attention to the inadequacies of the Section's purported investigation, but DOJ refused to reopen the matter. INSLAW then sought review by the Special Division of the Circuit Court of Appeals for this District of the Department's failure to appoint Independent Counsel, but the Division concluded

that it lacked jurisdiction over this request. DOJ has never replied to my letter of May 11, 1989 (Exhibit B). DOJ possesses investigative resources and powers vastly more extensive than those available to INSLAW but has resisted every effort to persuade them to make adequate use of those resources. Only Attorney General Thornburgh can assure DOJ employees otherwise willing to tell the truth that their doing so will not cost them their jobs.

In my judgment, the Bankruptcy Court findings alone should have spurred the Department to take swift, corrective action. DOJ's decision to forego and refuse a serious investigation into the Bankruptcy Court's findings and INSLAW's additional charges reflects the direct and irreconcilable conflict of interest which plagues DOJ's exercise of its investigative and prosecutorial functions in the matter.

The evidence assembled by INSLAW cries out for an investigation going beyond what INSLAW has been able to do with its own limited resources and drawing upon the full array of DOJ's legal powers and professional skills. INSLAW's allegations are more than sufficient to call upon DOJ to fulfill its responsibilities toward the firm and impartial enforcement of the criminal laws and the fair assessment of INSLAW's claims. DOJ has not carried out these responsibilities. It has not conducted the kind of investigation that would be necessary in order to determine whether or not DOJ officials were part of a conspiracy to destroy INSLAW. Until and unless there is a comprehensive, thorough and hardhitting

investigation, INSLAW will continue to be the victim of their persisting unfairness.

It was foreseeable that such an investigation would not only expose widely ramified criminal conduct on the part of Departmental employees, but also make the Department liable for punitive and consequential damages much larger than the $6.8 million already awarded. The less the Department knew of the facts, the more easily it could rationalize the non-performance of duty and minimize these risks. The Department could not completely duck an investigation, but it might get away with a superficial one. Taking that chance, the Public Integrity Section of the Criminal Division initiated a cursory review of INSLAW's charges, but made no serious attempt to determine their validity.

Because the Department refused to investigate INSLAW's allegations, INSLAW, at my suggestion, filed a Petition for a Writ of Mandamus requesting that the Court order a full and thorough investigation of INSLAW's allegations. At the very heart of INSLAW's petition was the assertion that the Justice Department had not made a serious effort to determine whether or not INSLAW's factual allegations are true. In opposing INSLAW's petition, the Justice Department did not deny the facts. As Judge Bryant pointed out in his opinion, they did not deny that the Public Integrity Section contacted only one of the many persons who furnished information on which the allegations in INSLAW's petition were based.

The Department, if it had done no more than match INSLAW's own investigative efforts would have identified the same individuals INSLAW identified and obtained the same information that INSLAW obtained. The Department did none of these things. To the contrary, it wound up a superficial inquiry without contacting more than one of INSLAW's key witnesses, without following up any of the leads furnished by INSLAW,, and without attempting to obtain the most obviously relevant documents and correspondence. Given these gross deficiencies, the Justice Department cannot plausibly claim that they fulfilled either their duty to enforce the criminal laws or their duty of fairness in their conduct of civil litigation.

INSLAW does not contend that the facts it has assembled are sufficient to prove a criminal conspiracy. It does contend, however, that these facts, coupled with the Bankruptcy Court's findings, create an imperative need for a thorough, hardhitting, and impartial investigation. Despite a great deal of time and expense devoted to developing a full explanation of the Department's malfeasance, INSLAW has not been able to pursue all the indicated leads, talk to all the available witnesses, or examine all the relevant documents. And even if they could, INSLAW still will not have means of obtaining critically important testimony anywhere near comparable to those at the command of the Department.

Against this background, the Department's statement of July 18, 1989 that its investigation had been terminated "due to lack of evidence of criminality" cannot

be accepted at face value. The termination is better explained on the basis that the Department felt trapped by its conflict of interest. At the time of the statement, the Civil Division was resisting INSLAW's claims on grounds which, had they been thoroughly investigated by the Criminal Division, might well have been found to be lacking in merit. The Department's duty to investigate the charges of a criminal conspiracy involving its own employees clashed with its interest in minimizing or defeating the civil damage claims against the Department. The Bankruptcy Court's findings and INSLAW's allegations impugned the Department's integrity. They implicated senior colleagues of the investigators themselves. Departmental pride was at stake. Rather than face the facts, it was easier to look for rationalizations, such as 'the evidence did not add up to the conclusive proof of crime,' 'everybody does favors for political friends,' or 'the Hamiltons are suffering from a persecution complex.' As the Bankruptcy Court observed, respondents' reaction was "to circle the wagons."

Judge Bryant denied the Petition for a Writ of Mandamus on grounds that INSLAW lacked standing, and on the grounds that prosecutorial discretion is generally unreviewable. He stated in a footnote, however, that:

> "Importantly, the House Judiciary Committee is presently investigating the activities of the Department and its then officials, employees, and friends as to the existence of a conspiracy of the type and magnitude alleged by INSLAW. The Washington Post reports that "[a]fter months of negotiations, Attorney General Dick Thornburgh has now assured the

Judiciary Committee Chairman Jack Brooks (D-TX) that his inquiry will have the full cooperation of the Department. Committee investigators will have direct access to Department personnel and documents, and employees will be assured that they can testify without fear of retribution." "Mr. Thornburgh Cooperates," The Washington Post, April 28, 1990, at A22. Clearly, this House committee is a body far better placed in the governmental scheme of things than the court (with resources unmatched in the Judiciary) to undertake such an evaluation."

INSLAW is left with only one recourse and that is the Congress. There is an inscription in the rotunda outside the office of the Attorney General of the United States that states, "The United States wins its point whenever justice is done its citizens in the courts." The Justice Department has chosen to ignore this principle; the Congress of the United States must remind the Justice Department that they are not just words inscribed on the rotunda to impress visitors to the Justice Department, but, rather, words that express a covenant between the Government and the American people.

This concludes my prepared statement, Mr. Chairman. I would be happy to respond to the Committee's questions.

Mr. BROOKS. Mr. Hamilton, we are going to put all of your statement in the record, every pristine word. We would like for you to summarize it, take about 5 minutes, so we can get on with some questions for you, for your lovely wife, and for the ambassador. You are recognized.

STATEMENT OF WILLIAM A. HAMILTON, PRESIDENT, INSLAW, INC.

Mr. HAMILTON. Thank you, Mr. Chairman and members of the subcommittee. We appreciate the opportunity to appear here today. The written testimony was prepared by Nancy and me. I will just highlight some factors in our joint testimony.

INSLAW has licensed its PROMIS and PROMIS derivative case management software to customers in over 200 locations throughout the United States and Europe. The true size of INSLAW's base of customers, however, appears to be as much as twice what INSLAW has on its books because of an organized piracy of the INSLAW software by the U.S. Government and selected private sector friends of the U.S. Government.

Two courts, as Mr. Richardson has said, have already confirmed that at least 44 copies of the software have been pirated by the U.S. Department of Justice. Other sources have alleged that the piracy already adjudicated in the courts is merely the tip of the iceberg.

The Justice Department, as you pointed out, Mr. Chairman, espouses the belief that each of the Federal judges who has ruled in the INSLAW case is in error because the case is really just a Government contracts issue. The evidence uncovered by INSLAW exposes the fallacy of this proposition and supports an alternative explanation: No. 1, that the Reagan administration made a decision in the White House in early 1981 to launch a massive contract at the Justice Department to install INSLAW's PROMIS software in every litigative and investigative agency of the Department nationwide; No. 2, that a massive sweetheart contract for this purpose was to be awarded to certain friends of the Reagan administration, including Earl Brian, a venture capitalist who had served in the California cabinet of Governor Reagan; No. 3, that D. Lowell Jensen, who began the Reagan administration as the Presidential appointee in charge of the Criminal Division and who ended as the Deputy Attorney General under Mr. Meese, would not only arrange for the massive sweetheart contract but would also do whatever was necessary to drive INSLAW out of business so that the massive PROMIS contract could be awarded to Earl Brian and the other unidentified friends; No. 4, that Mr. Jensen engineered a series of sham contract disputes under the March 1982 contract with INSLAW with the objective of getting INSLAW out of the way so that the business could be awarded to friends of the Reagan administration; and No. 5, that Mr. Jensen and Mr. Meese chartered the Uniform Office Automation and Case Management Project, which is the official name of Project EAGLE, in December 1985, as the vehicle for the massive contract.

On May 4 or 5, 1981, at a meeting at the White House, Edwin Meese made some disclosures to one of the 30 witnesses that Mr.

Richardson referred to that proved, in our opinion, to be very telling in light of the subsequent actions by the Justice Department. Mr. Meese disclosed that the Reagan administration had, by then, that is to say by May 4 or 5, 1981, already decided to launch a massive contract at the Justice Department to implement the PROMIS software; that Mr. Jensen, then heading the Criminal Division, would spearhead the planned procurement; that INSLAW should not expect that it would automatically receive the contract; that the Justice contract to implement PROMIS would include all of the legal divisions in Washington and all of the investigative agencies and the U.S. attorneys; and that the Reagan administration, unlike the Carter administration, was pro law enforcement and had, therefore, rejected as inadequate an earlier plan of the outgoing Carter administration to implement PROMIS in only the 20 largest U.S. attorneys' offices.

Between the summer of 1981 and the time that INSLAW received its contract in March 1982, the Department prepared the way for the possibility of sabotaging the contract in the future. It forced the ouster of the incumbent PROMIS project manager at the Department and replaced her with C. Madison Brewer, whom the Department recruited for that purpose. Mr. Brewer had previously been dismissed by INSLAW as an employee for cause.

During the summer of 1981, the Department also forced the ouster of the incumbent PROMIS contracting officer and replaced her with Peter Videnieks from the U.S. Customs Service. Mr. Videnieks had been serving at the time of his recruitment as the contracting officer for several contracts with companied controlled by Earl Brian at the U.S. Customs Service.

Two weeks after—as Mr. Richardson said—after the contract was modified to take delivery of the proprietary version of our contract, the head of Hadron called me and threatened me with consequences if I did not agree to sell the software and the company to Hadron. Mr. Laiti, who was then the head of Hadron, told me that Hadron was positioned, as a result of political contacts at the highest level of the Reagan administration, to be able to receive the Federal Government's case management software business but that Hadron needed the PROMIS software for that purpose. Mr. Laiti, during the conversation, identified Mr. Meese as Hadron's principal contact at the highest level of the Reagan administration.

During the 90-day period following the threat from Mr. Laiti, DOJ officials made good on his threat. Mr. Videnieks began withholding large amounts of money for services that INSLAW was performing under the contract. In the first 3 months of these disputes, Mr. Videnieks had withheld payment of almost a quarter of a million dollars. Eventually, he withheld payment of $2 million and drove INSLAW into bankruptcy.

During that same 90-day period when the disputes started, a DOJ whistleblower went to the Congress and talked to an aide to Senator Max Baucus and warned that Mr. Meese and Mr. Jensen then had a plan to take the PROMIS software and award a massive sweetheart contract to their friends.

Mr. Brian and Mr. Laiti were so confident that these contract disputes would succeed in driving INSLAW into bankruptcy so that they could obtain the software that, in September 1983, just a few

months after the disputes began, they met in New York City to raise $7 million of capital from their Wall Street investment bank to buy the PROMIS software. Of course, Brian and Laiti knew that PROMIS was not for sale.

They also met that month with representatives of an institutional investor who had a small equity interest in INSLAW. The message delivered to that investor in September 1983, was that I had rebuffed an acquisition overture earlier in the year and that, as a consequence, INSLAW had encountered a series of contract disputes which would prove incapable of resolution. As of today, these Justice contract disputes have never been resolved, and we have never been paid any of the $2 million that Videnieks withheld on account of the disputes.

At the end of 1983, Mr. Jensen took those contract disputes and used them as the basis for preapproving a plan to terminate our entire contract for default. Had that worked, INSLAW would have disappeared in 1984.

In the beginning of this year, the Department renewed its effort to acquire the PROMIS software. INSLAW filed a formal protest substantiating the basis for its belief that this 1990 procurement was a thinly disguised effort, once again, to steal the software. After we filed that protest, the Department aborted the procurement.

In 1988, the chief investigator of the Senate Judiciary Committee visited Nancy Hamilton and me at our offices to pass on information from a very unhappy person in the Justice Department whom he described as a senior career official. The chief investigator told us that Mr. Jensen had engineered INSLAW's contract disputes right from the start in order to get INSLAW out of the way and give the business to friends. The Department, however, has never shown any interest in finding out the identity of the senior Justice Department official who was the source for the chief investigator.

Since September, we have been attempting, without any success, to obtain court authority to conduct additional discovery because of rapidly accumulating indications that the piracy of our software is much more widespread than that already found by the court.

Thank you, Mr. Chairman.

Mr. BROOKS. Thank you very much, Mr. Hamilton.

[Mr. and Mrs. Hamilton's prepared statement follows:]

STATEMENT OF WILLIAM A. AND NANCY B. HAMILTON

Mr. Chairman, we are William A. and Nancy Burke Hamilton, the President and Vice President, respectively, of INSLAW, Inc. We are the principal founders and owners of the Company, and husband and wife.

We would like to express our appreciation to you, Mr. Chairman, and to the Subcommittee on the Judiciary for giving us this opportunity to testify about what we believe is serious malfeasance against INSLAW, Inc., by the United States Department of Justice that began in 1981 and continues to this day.

A. **The Justice Department's Effort to Portray the INSLAW Case as a Government Contract Dispute is Reminiscent of the Initial Pretense That Watergate was Just a Burglary.**

In January 1988, the United States Bankruptcy Court for the District of Columbia ruled that officials of the Justice Department had stolen "through trickery, fraud and deceit" 44 copies of the PROMIS legal case management computer software manufactured by INSLAW, and then implemented a covert plan to force INSLAW's liquidation "without justification and by improper means."

In November 1989, the U.S. District Court issued a 44-page Opinion and Order, stating that the evidence was sufficient to affirm the findings "under any standard of review," and observing that the misconduct against INSLAW emanated from "higher echelons" of the Justice Department.

The Justice Department has not accepted the rulings of either of these federal courts, choosing, instead, to appeal the matter further to the U.S. Court of Appeals, where it is currently pending.

The Justice Department has repeatedly attempted to portray the INSLAW case as nothing more than an unusually acrimonious government contract dispute. We believe that this effort is about as credible as the government effort, a decade and a half ago, to portray Watergate as nothing more than a third rate burglary.

B. **The Reagan White House Decision in Early 1981 to Launch a Massive Contract at the Justice Department for the Implementation of INSLAW's PROMIS Case Management Software in Every Litigative and Investigative Office of the Justice Department.**

In 1980, Congress mandated, through the Appropriations Authorization Act, that the Justice Department implement a uniform case management software system throughout all of its litigation activities in the United States, including the 94 U.S. Attorneys' Offices. The objective was to provide better management statistics to the Congress and the Office of Management and Budget on the use of litigative resources.

During the hearings before the Senate Judiciary Committee that preceded this mandate, Justice Department officials testified that they expected to use the PROMIS software created by INSLAW, Inc. to satisfy this Congressional mandate.

At a meeting in the White House on May 4 or 5, 1981, Edwin Meese, then Counsellor to the President, told Donald Santarelli, a former Presidential appointee in the Nixon Justice Department and an attorney for INSLAW, that the Reagan Administration had already decided to launch a massive contract at the Justice Department to implement the PROMIS software in all 94 U.S. Attorneys' Offices, all of the legal divisions in Washington, and in Justice Department agencies such as the Drug Enforcement Administration, the U.S. Marshals Service, the Immigration and Naturalization Service, the Bureau of Prisons, and the FBI, if the FBI could be persuaded to cooperate.

Meese told Santarelli that D. Lowell Jensen, then the Assistant Attorney General for the Criminal Division, would spearhead the arrangements within the Justice Department for this massive procurement.

Finally, Meese warned Santarelli that INSLAW should not expect that it would automatically receive the PROMIS contract.

C. The Reagan White House and Justice Department Deliberately Lay the Foundation in 1981 and 1982 for the Later Sabotage of INSLAW's Contract.

The Carter Justice Department had planned to implement PROMIS in the 20 largest U.S. Attorneys' Offices, based on a successful pilot test of PROMIS in U.S. Attorneys' Offices in New Jersey and in San Diego, California.

Meese told Santarelli, however, that the Reagan Administration was not going to be content with such a modest scope of implementation of PROMIS because the Reagan Administration, in contrast to the Carter Administration, was pro-law enforcement.

One of the first actions that Jensen apparently took in 1981 vis-a-vis PROMIS

was to approach Stan Morris, then Associate Deputy Attorney General, in an effort, curious in light of Meese's statements to Santarelli, to scuttle the plan for a procurement to implement PROMIS in the 20 largest U.S. Attorneys' Offices. Both Morris and Jensen testified about this Jensen effort in depositions taken by INSLAW in 1987. Morris declined to heed Jensen's advice.

By June 1981, Justice Department officials knew that the 20-city PROMIS procurement would be going forward; that INSLAW would most probably win the competitive procurement; and that the Justice Department would have to take steps to subvert INSLAW's expected contract. This, according to Frank Mallgrave, then Assistant Director of the Executive Office for U.S. Attorneys, is what Larry McWhorter, then the Deputy Director of the Executive Office, told him in words or substance in May or June 1981.

The Justice Department did not waste any time in preparing to subvert the 20-city PROMIS Implementation Contract that it expected INSLAW to win.

In August 1981, McWhorter recruited C. Madison Brewer, a fired employee of INSLAW, as the full-time PROMIS Project Manager at the Justice Department. McWhorter admitted in his 1987 testimony that he recruited Brewer because he knew that Brewer had previously been employed at INSLAW and he expected INSLAW to win the procurement. Although McWhorter denied knowing that INSLAW had fired Brewer, the Bankruptcy Court did not believe McWhorter. As demonstrated at the 1987 trial, Brewer did not have the kind of experience or training in computer software or project management that would normally be a pre-requisite for appointment to such a position.

To bring Brewer in, McWhorter had to force the incumbent PROMIS Project Manager, Patricia Goodrich, to vacate the position. McWhorter did this, even though Goodrich had experience in the very disciplines that Brewer lacked.

In September 1981, the Justice Department also forced the incumbent PROMIS Contracting Officer, Betty Thomas, to vacate her position. Elizabeth Rudd, a senior procurement official at the Justice Department, threatened during the summer of 1981 to bring charges of "non-feasance" against Thomas unless she stepped aside. Rudd then went outside the Justice Department for the new PROMIS Contracting Officer, selecting Peter Videnieks from the Treasury Department's Customs Service.

When Videnieks joined the Justice Department, he vacated his position at the Customs Service as Contracting Officer for several contracts between Customs and subsidiaries of Hadron, Inc. Earl Brian, who served as Secretary of Health and Welfare in California under Governor Ronald Reagan, effectively controlled Hadron throughout the 1980's, by having the right to name four of the six members of

Hadron's Board of Directors. Earl Brian is also a key figure in the malfeasance against INSLAW.

As INSLAW later discovered, the Reagan White House and Justice Department intended to award the massive PROMIS contract to selected "friends" of the Reagan Administration, including Earl Brian. We highlight evidence of this later in our written testimony.

At the time that the Justice Department hired Videnieks in September 1981, Brian was serving as the unpaid Chairman of a White House Task Force on Health Care Cost Reduction, reporting to Meese. In 1982, Brian also served with Meese on a cabinet-level White House Committee with the title, ironic in view of the facts of the INSLAW case, of "Pro Comp" for "pro-competition."

In 1987, the Bankruptcy Court issued a Permanent Injunction against Brewer and Videnieks ever again having any official duties at the Justice Department relating to INSLAW, because of their protracted and outrageous misconduct against the Company. Well before March 1982, when INSLAW won its three-year PROMIS Implementation Contract, Brewer and Videnieks had been positioned to sabotage the contract.

The Bankruptcy Court later found that within one month of the award of the contract to INSLAW, Brewer and Videnieks had participated in a meeting at the Justice Department to discuss terminating the newly-awarded three-year contract, and to discuss ways to harm INSLAW's interests under each of the other contracts that INSLAW then had with the Justice Department.

The Bankruptcy Court also later found that by the end of 1982 both Videnieks and Brewer had authored separate internal Justice Department documents forecasting INSLAW's demise as a company, and the takeover of the PROMIS technology by the government.

D. In 1983, the Justice Department and a Key Reagan Administration Political Supporter by the Name of Earl Brian Take Action to Sabotage INSLAW's Contract So That the Justice Department Can Award a Massive Sweetheart Contract to Friends of the Reagan Administration.

The triggering event for the implementation of Brewer's and Videnieks's written plans for INSLAW's demise was INSLAW's refusal in April 1983 to be purchased by Hadron, Inc., a company then controlled by Earl Brian.

Dominick Laiti, then Chairman of Hadron, Inc., had telephoned Bill Hamilton

on or about April 20, 1983. Laiti said that he wanted to get together to arrange the purchase of INSLAW because Hadron needed title to PROMIS. Laiti said that Hadron had connections with Meese in the White House that would enable Hadron to obtain the federal government's case management software business, but that Hadron would need to have the PROMIS software for the anticipated contracts. When Bill Hamilton declined to meet with Laiti, Laiti issued the following threat: "we have ways of making you sell." Laiti also noted that Ms. Meese then owned stock in his company. Ms. Meese did, in fact, own stock in Biotech Capital Corporation at that time, according to the subsequent report of Independent Counsel Jacob Stein. Biotech Capital Corporation, currently known as Infotechnology, does, in turn, control four of the six seats on Hadron's Board of Directors. Brian was then CEO of Biotech.

During the ensuing 90-day period, the Justice Department made good on Laiti's threat. A series of contract disputes suddenly developed. Videnieks used these non-adjudicated disputes as pretexts to withhold payments to INSLAW for services rendered under the contract. Eventually, Videnieks withheld payment of about $2 million for services rendered. On February 7, 1985, INSLAW filed for bankruptcy protection because of these withholdings.

Under federal government contract law, a vendor may not stop work when a dispute arises. In return, the Government may not withhold payment until the dispute is adjudicated. Videnieks and the Justice Department ignored that bedrock principle of government contract law. To this day, the Justice Department has never paid INSLAW a penny of the money Videnieks illegally withheld, despite devastating condemnation of Videnieks' misconduct against INSLAW by the Bankruptcy Court.

Five years after this illegal withholding began, INSLAW learned from several informants that Jensen had engineered the disputes as a ruse for driving INSLAW out of business. For example, Ronald LeGrand, then Chief Investigator of the Senate Judiciary Committee, contacted us in May 1988 and told us that a trusted senior Justice Department career official, whom LeGrand had by then known for 15 years, had asked LeGrand to pass certain information on to us.

According to LeGrand, his trusted source claimed that Jensen had engineered INSLAW's contract disputes "right from the start" in order "to get INSLAW out of the way and give the business to friends."

According to LeGrand, his source had read an early 1988 Barron's cover story about INSLAW, and had made the observation that INSLAW's hypothesis was correct in viewing the misconduct already found by the court as only a small part of a much larger procurement fraud involving Meese, Jensen and Brian. According to LeGrand, however, his source also warned that we did "not know squat about

how dirty the INSLAW matter really is" and that we "would be sickened if we ever learned even half of it." LeGrand said his source was employed in the Criminal Division at the time of Watergate, and that his source had claimed that the INSLAW matter is "a lot dirtier for the Justice Department than Watergate was, in both its breadth and its depth."

In June 1983, at the time that the contract disputes initially arose, a Justice Department "whistle-blower" warned Congress that Jensen and Meese had a plan to award "a massive sweetheart contract to their friends" to implement PROMIS in every litigation office of the Justice Department, as soon as Meese became Attorney General. The whistle-blower gave the warning to the staff of Senator Max Baucus, who ordered a General Accounting Office investigation of the allegation, shortly after Meese was nominated as Attorney General in January 1985.

In September 1983, about six months after the contract disputes had arisen, Brian, Laiti, and others gathered in New York City for meetings with institutional investors about buying the PROMIS software, according to witnesses located by INSLAW.

After meeting with Brian, Laiti and a colleague named Paul Wormeli visited Brian's long-time investment bank, Allen and Company, and met with Herbert A. Allen, Jr., the CEO, and Mark Tessleman, then a Vice President. According to Wormeli, Hadron was seeking $7 million in equity capital for its criminal justice expansion plans. According to Marilyn Titus, a former secretary at Hadron, Brian, Laiti and Wormeli went to New York "to raise the capital to buy the court software."

Obviously, Hadron knew that the PROMIS court software was not for sale. Nevertheless, during the same month of September 1983, someone described to William Hamilton as "a businessman with ties to the highest level of the Reagan Administration" met with representatives of one of INSLAW's institutional investors, 53rd Street Ventures.

This unidentified businessman talked about how William Hamilton had rebuffed Hadron's acquisition overture earlier in the year; about how INSLAW had then subsequently confronted contract disputes at the Justice Department and about the fact that these disputes would prove to be irresolvable.

According to Jonathan Ben Cnaan, the 53rd Street Ventures officer who related this account to William Hamilton in October 1983, the "businessman" was determined to wrest control of PROMIS from INSLAW for use in contracts with the federal government.

Ben Cnaan warned Hamilton to walk away from the Justice Department contract and allow the "businessman" to use the PROMIS software for contracts

with the Reagan Administration, or face destruction by this friend of the Reagan White House.

On December 29, 1983, virtually on the eve of Meese's nomination as Attorney General, Jensen pre-approved a plan for Videnieks to use the sham contract disputes as justification for terminating the INSLAW contract for default.

E. The Sabotage and Planned Destruction of INSLAW Is Temporarily Stalled by Two Investigations of Meese in 1984

Meese was nominated as Attorney General in late January 1984.

In early February 1984, acting on the June 1983 warning from a Justice Department whistle-blower, Senator Max Baucus, then a member of the Senate Judiciary Committee, asked the General Accounting Office to investigate the allegations about plans for Meese and Jensen to award a massive sweetheart contract to unidentified friends for the installation of PROMIS.

Within days of the start of the investigation, Jensen de-escalated the planned termination of the INSLAW contract for default into a partial termination of the contract for the convenience of the government.

While the GAO investigation was underway, the U.S. Court of Appeals appointed Jacob Stein as Independent Counsel to investigate certain allegations about Meese that had arisen at the start of Meese's confirmation hearings. One of the allegations was that Meese had failed to disclose his family's equity interests in two companies controlled by Earl Brian.

In September 1984, both the GAO and the Stein investigations ended. Stein was unable to find evidence that Meese's failure to disclose his family's equity interest in Brian-controlled companies resulted from a plan to award a sweetheart contract to those companies. GAO apparently assumed that INSLAW would have been the logical beneficiary of any massive sweetheart contract on PROMIS and concluded that the Justice Department hostility toward INSLAW was so great as to make any sweetheart arrangement totally implausible.

GAO evidently did not realize that the Justice Department intended to put INSLAW out of business and then award the massive sweetheart contract to Brian. Stein, in turn, may not have even known about the GAO investigation.

What Stein did, in fact, know, according to the official records of his investigation at the National Archives and Records Service, was that Meese's White

House Staff had been unable to locate Meese's telephone logs for large parts of 1983. Stein could not have known, however, that the time periods for the missing logs coincided with the acquisition overture by Hadron, the implementation of Laiti's threat through the initiation of the sham contract disputes, and the trip to New York by Brian and Laiti to raise the capital to buy PROMIS.

INSLAW learned through litigation discovery in 1987 that Jensen's telephone logs from his tenure at the Justice Department are also unavailable. Jensen took all of his telephone logs with him when he left the Justice Department in the summer of 1986.

Stein probably could not have known either that Meese's defense counsel, in the Stein investigation, Dickstein, Shapiro and Morin, shredded 40 bankers' boxes full of Meese's White House records. INSLAW learned this from two former employees of that law firm who participated in the shredding: Henry Darrington and Timothy Walker.

F. Meese Becomes Attorney General in February 1985 as INSLAW Is Forced into Bankruptcy

On February 7, 1985, INSLAW filed for Chapter 11 bankruptcy protection because the Justice Department had by then illegally withheld payment of about $2 million for services rendered under the contract.

Later the same month, Meese was confirmed as Attorney General.

As the Bankruptcy Court later ruled, the Justice Department, immediately after INSLAW filed for protection, implemented a covert plan to force INSLAW's liquidation "without justification and by improper means."

Justice Department attorneys presented themselves at meetings of INSLAW's creditors and in Bankruptcy Court in 1985. They described the Justice Department as INSLAW's largest unsecured creditor. They demanded that INSLAW disclose to the Justice Department the names of all of INSLAW's customers and prospects.

The Bankruptcy Court issued a Confidentiality Order in July 1985, barring the Justice Department from having access to this information. That Order effectively stymied the Justice Department's covert 1985 plan to liquidate INSLAW.

G. In December 1985, Jensen and Meese Launch the Most Massive Procurement in Justice Department History: The Uniform Office Automation and Case Management Project, Code-named Project EAGLE

On December 9, 1985, Jensen officially chartered Project EAGLE, the Uniform Office Automation and Case Management Project. The Justice Department issued the EAGLE Request for Proposals in May 1986.

In August 1986, the Justice Department amended the pending procurement to require that every EAGLE computer be equipped with certain features.

In September 1986, the Justice Department published to all EAGLE bidders an unequivocal denial that these features implied an undisclosed plan to implement PROMIS as the uniform case management software for EAGLE.

By April 15, 1988, however, the Justice Department had admitted in a pleading filed in U.S. District Court in the INSLAW litigation that the very same features that it had mandated in the August 1986 Amendment were mandated to give the government the option of implementing PROMIS on the EAGLE computers.

H. INSLAW Files Suit Against the Justice Department and Is Immediately Subjected to a Hostile Takeover Attempt By a Company Whose Actions Were Encouraged by the Justice Department

In June 1986, INSLAW filed suit against the Justice Department in U.S. Bankruptcy Court, alleging that officials of the Justice Department were unlawfully exercising control over INSLAW's proprietary PROMIS software in violation of the automatic stay.

Just as INSLAW filed the lawsuit, Systems and Computer Technology, Inc. (SCT) of Malvern, Pennsylvania, secretly approached INSLAW's Unsecured Creditors' Committee with an offer of $3.6 million in cash for the Company's debts, provided that the Committee would support a forced sale of INSLAW to SCT.

Counsel for INSLAW's Unsecured Creditors' Committee then immediately filed a motion in Bankruptcy Court asking the court to strip INSLAW of court protection so that the Committee could negotiate the sale of INSLAW to SCT.

During the summer of 1986, we were able to persuade a majority of the Unsecured Creditors' Committee to refuse the SCT offer, and to support our request for a six month extension in Bankruptcy Court protection.

In late August 1986, the Bankruptcy Court granted the six-month extension, effectively ending the hostile takeover bid.

We later discovered in our own investigation that officials of SCT had met, in advance of their hostile takeover move, with Justice Department officials, including James Stewart, then a Presidential Appointee, to discuss the planned hostile takeover of INSLAW. Meese, Jensen, and Stewart were all originally from Alameda County, California.

According to interviews with former SCT employees, Justice Department officials led SCT to believe that INSLAW's contract disputes would be resolved promptly once the hostile takeover bid succeeded and William Hamilton was removed as President.

One former SCT employee, Robert Radford, provided INSLAW with a sworn affidavit claiming that SCT had given him and other employees a script to use in disparaging INSLAW to its customers and prospects in state and local governments throughout the United States.

We also later discovered that prior to launching the hostile takeover bid, SCT President Michael Emmi flew to the Berkshire Mountains to discuss the planned takeover of INSLAW with someone from outside of SCT by the name of Allen. Allen and Company, Earl Brian's investment bankers, subsequent to this meeting, invested $5 million in SCT stock. Herbert A. Allen, Jr. reportedly owns a vacation home in the Williamstown, Massachusetts section of the Berkshire Mountains.

I. Deputy Attorney General Arnold Burns Then Takes Action to Force INSLAW to Concede to the Justice Department the Right to Expand the Use of the PROMIS Software

At almost the same time in late August 1986 when INSLAW defeated SCT's hostile takeover bid, Deputy Attorney General Arnold Burns wrote to INSLAW's litigation counsel, Leigh Ratiner of Dickstein, Shapiro and Morin.

Burns's letter offered an early and, by implication, favorable resolution of the contract disputes if only INSLAW would concede to the Justice Department the right to implement PROMIS without paying license fees to INSLAW.

According to a September 1989 staff report on the INSLAW matter by the Senate Permanent Investigations Subcommittee, Burns had a "social luncheon" with Leonard Garment on October 6, 1986 to complain about Ratiner's prosecution of INSLAW's lawsuit against the Justice Department. Garment is a senior partner at

Dickstein, Shapiro and Morin, and had served as defense counsel for Meese in the Jacob Stein investigation. Dickstein, Shapiro and Morin has never disclosed the Garment/Burns social luncheon to INSLAW.

The following week in October 1986, Garment and the other members of the Senior Policy Committee of the law firm met and agreed to ask Ratiner to leave the law firm where he had by then been a partner for 10 years.

In January 1987, with Ratiner no longer on the INSLAW case, Dickstein, Shapiro and Morin presented us with a written demand for authority to settle the lawsuit on terms nearly identical to those offered by Burns in his August 1986 letter to Ratiner. The Dickstein, Shapiro and Morin letter informed us that the law firm would seek leave of the Bankruptcy Court to withdraw as counsel unless we acceded to their demands.

Fortunately, we were able to find new trial counsel and litigate and win our case in 1987. The new co-counsel for our litigation were McDermott, Will and Emery and Kellogg, Williams and Lyons.

J. As INSLAW Wins Its Case, the Government Renews Its Attempt to Liquidate the Company and Tries to Give New Life to the Sham Contract Disputes.

The Bankruptcy Court issued its oral ruling in the Summer and Fall of 1987, including its findings about the covert and unlawful effort in 1985 to force INSLAW's liquidation.

In November 1987, following those rulings, the IRS argued unsuccessfully in the Bankruptcy Court for the liquidation of INSLAW. Apparently the government felt no embarrassment at attempting to do overtly in 1987 what the Bankruptcy Court earlier that year had condemned the government for having tried to do covertly in 1985.

In October 1987, the Justice Department contacted the Director of the Defense Contract Audit Agency (DCAA) to arrange a new audit of INSLAW's PROMIS Implementation Contract. The Justice Department's own auditors had already conducted seven separate audits of this contract, and had published seven audit reports.

Justice Department counsel subsequently stated on the record in U.S. District Court that the Justice Department intended to litigate the contract disputes, before the Department of Transportation Board of Contract Appeals, with the expectation

of clearing Jensen of wrongdoing in the INSLAW case.

During 1989, the Justice Department made repeated attempts to rent space in INSLAW's office building for the DCAA Auditors to use while conducting the eighth and entirely redundant government audit of INSLAW.

K. INSLAW Asks the Justice Department to Seek the Appointment of an Independent Counsel

In February 1988, we submitted a written complaint to the Criminal Division's Public Integrity Section about Meese, Jensen and Brian. We asked for the appointment of an Independent Counsel under the Ethics in Government Act.

That same month, we sought an opportunity, through our litigation counsel, for a meeting to discuss our complaint with a representative of the Public Integrity Section. We were refused, even though our written complaint was accompanied by the several hundred findings of fact of a federal bankruptcy judge, and fifteen pages of additional facts about the broader scope of the malfeasance.

In May 1988, the Justice Department issued a press release announcing that it had cleared Attorney General Meese of any wrongdoing in the INSLAW matter.

In December 1989, INSLAW filed a Petition for a Writ of Mandamus seeking to compel Attorney General Thornburgh and the U.S. Department of Justice to conduct a fair and thorough investigation of our complaint. We noted in our Petition that the Justice Department had failed to interview 29 of the 30 witnesses whom INSLAW had identified, and that many of the witnesses are former or current Justice Department officials. The U.S. District Court denied INSLAW's Petition in October 1990 on grounds of legal standing, but noted that the seemingly cursory nature of the Justice Department investigation might indicate a conflict of interest.

L. The Government Attempts to Block INSLAW's Reorganization Plan

IBM and INSLAW are business partners in marketing computer-based solutions to state and local courts and justice agencies, and to insurance company claims offices.

IBM offered to loan INSLAW $2.5 million if INSLAW could obtain Bankruptcy Court confirmation of a Plan of Reorganization by the end of 1988.

The government strenuously objected to INSLAW's Plan of Reorganization

because of the Company's tax arrearage. The Bankruptcy Court,noting that the government owes INSLAW in court awards of damages and legal fees more than 10 times what INSLAW owes the IRS, overruled the government's objections, and confirmed the Plan by the end of 1988.

The government then moved again in Bankruptcy Court, attempting this time to block the disbursement of the IBM financing. If successful, the government would have prevented the consummation of INSLAW's Plan of Reorganization. Once again, the Court rejected the government's effort to destroy INSLAW.

M. In 1990, the Justice Department Renews Its Effort to Acquire PROMIS Through Trickery, Fraud and Deceit

In January 1990, the Justice Department issued a Request for Proposals for the development of a new case management software system to replace INSLAW's PROMIS in the Lands and Natural Resources Division.

The government stated in the solicitation that the government wished to own exclusive title to the new software product, and that it might later implement the software on computers acquired under Project EAGLE.

The most critical success factor for the winning vendor, according to the solicitation, was recent and extensive working experience with the PROMIS source code. The government falsely stated that it had the right to give the winning vendor access to the PROMIS source code and documentation.

The software product specifications in the solicitation almost perfectly matched the features and functions of the current version of PROMIS.

INSLAW filed an agency bid protest against this solicitation. The Justice Department subsequently cancelled the procurement.

N. Evidence Rapidly Accumulates that the Justice Department Piracy of the PROMIS Software Is Much Greater Than Has Been Previously Admitted in Court.

In September 1990, INSLAW sought authority from the U.S. District Court to conduct limited discovery to determine the validity of claims by multiple sources that the Justice Department piracy of the PROMIS software is much more widespread than the Justice Department has acknowledged in Bankruptcy Court.

One source, a recently retired senior level Justice Department official, claims that the Office of the Attorney General of the United States issued orders in the

summer of 1988 to implement PROMIS in offices other than U.S. Attorneys Offices. The Bankruptcy Court's Permanent Injunction against such proliferation was already in full force by then.

As was sadly predictable, the Justice Department, which will not conduct a fair and thorough investigation of its own and which refuses to seek the appointment of an Independent Counsel, is attempting to prevent INSLAW from conducting the limited discovery necessary to prove or disprove the allegations of much broader Justice Department piracy of INSLAW's PROMIS software.

Mr. BROOKS. Mr. and Mrs. Hamilton, are you familiar with an incident in which a company in Kentucky obtained a copy of the PROMIS source code from the Department of Justice?

Mr. HAMILTON. Yes, we are, Mr. Chairman.

Mr. BROOKS. Would you explain that just briefly?

Mr. HAMILTON. There have been articles in the computer trade press and in the Washington Business Journal about Mr. Charles Hayes, who is the president of Challenger, Ltd., a company that buys used computer equipment from the U.S. Government. Mr. Hayes is quoted as saying that when he bought a used machine from the U.S. attorney's office in Lexington, KY, that it contained software which he believes may be the PROMIS source code or a derivative of the PROMIS source code.

Mr. BROOKS. I know there was a story in Government Computer News on November 12, 1990.

Mr. HAMILTON. Yes, I am aware of that story, Mr. Chairman.

Mr. BROOKS. It reported that Challenger, Ltd., has obtained a copy of PROMIS from the Department and that tapes also received contained sensitive information, grand jury material, identification of protected—allegedly protected—witnesses and informants.

Without objection, I would like to put that story in the record at this time.

[The story follows:]

11-12-90

Scrap Dealer's Troubles Raise Security Questions

By Vanessa Jo Grimm
GCN Staff

The troubles of a Kentucky computer scrap dealer who has become embroiled in a legal battle with the Justice Department over a broken Lanier word processing system have prompted a congressional review.

Charles Hayes, owner of Challenger Ltd., a computer scrap business in Nancy, Ky., may have obtained sensitive records of the U.S. Attorney's Office in Lexington when he bought a truckload of computer equipment for $45 at a General Services Administration auction (GCN, Sept. 10).

The department's inability to prevent the loss of the data, which may have included details about confidential government informants, grand jury proceedings and other sensitive case data, raised eyebrows on Capitol Hill.

"Justice has not done a good job of complying with the Computer Security Act," one House staff member said, adding the Hayes incident brings into question whether the department has any established practices for disposing of computer systems that process classified or sensitive information.

Rep. Bob Wise (D-W.Va.), chairman of the Government Operations Subcommittee on Government Information, Justice and Agriculture, has asked the General Accounting Office to look into just such issues and determine what standards the department does or does not have.

The department has sued Hayes, alleging he may have intentionally mailed FBI and Justice officials about the equipment's use and disposal once he bought it.

Hayes has denied these allegations and contends he has cooperated fully with the government.

Hayes bought 13 terminals, two central processors, two storage units and nine printers. But he said he also was given backup magnetic-tape cartridges, cables, manuals, diskettes and access codes. He also said the U.S. Attorney's Office in Lexington told him all the information had been erased by the equipment's maker, the Harris-Lanier Corp., now Syntrex Inc. of Eatontown, N.J.

Justice officials said they learned after the sale that Syntrex might have failed to remove the data.

Hayes has said he could not operate the equipment and did not know whether any data remained.

Security Threat

"We are concerned about whether anyone accessed the information, copied it, attempted to sell it or disseminate it in any way," Justice attorney Jeffrey S. Gutman said at a September hearing in U.S. District Court for the Eastern District of Kentucky.

Justice spokesman Michael Robinson said the department believes it has recovered all the equipment sent. Officials are continuing, however, to investigate whether any information could have been copied and passed along, he said.

Robinson said the department no longer will try to erase or clean hard disks and then resell them through GSA. Instead, Justice will destroy surplus data storage devices, he said.

The subcommittee's GAO review request follows on the heels of a GAO report lambasting the department for inadequate computer security efforts. Wise also requested that report.

Raises Questions

A congressional staff member said the latest incident raises interesting questions about whether similar problems may have occurred or are likely.

"We don't want to prejudge the department, but past experience makes one think things aren't too good there," the staff member said.

That the department is in litigation with Hayes does not mean Justice can forestall the GAO review, the staff member said, because GAO will focus on department management practices.

Meanwhile, Justice and Hayes continue to lock horns. Hayes has refused to settle his differences with the department.

Justice offered to pay Hayes $45 and drop the matter. Hayes' lawyer, William D. Gregory, said in court. But Hayes declined because his legal bills and other costs far outweigh the $45 Hayes paid for the broken equipment.

The court issued a preliminary injunction that forbids Hayes to release any data he may have obtained from the equipment.

Mr. BROOKS. Mr. and Mrs. Hamilton, is it true that the Department is currently using an inefficient and outdated version of the PROMIS software, and what impact does this have on the Department's operations and efficiency?

Mr. HAMILTON. It is true, Mr. Chairman. The nature of software is that it is updated on a regular basis with new features and new functions, and during the trial in 1987 in the U.S. Bankruptcy Court the U.S. attorney's office in the Southern District of New York attempted to send their computer systems director down to INSLAW—this came out during the trial—to discuss acquisition of these updates, but the Justice Department in Washington would not permit the meeting to take place. The Department has been running the software since 1983 or 1984 in those U.S. attorneys' offices without any updates. The software doesn't break down, but there's a lot of functions that the State and local prosecutors have and that the U.S. attorneys should have.

Mr. BROOKS. To all of the panel: Why, in your judgment, did the Department request mediation of the INSLAW case from the U.S. Court of Appeals, and what was the outcome?

Would you like to handle that, Ambassador?

Mr. RICHARDSON. I would be glad to, Mr. Chairman.

We can only assume that, in asking the Court of Appeals for the District of Columbia to appoint a mediator, the Department must have hoped to get a better break with a mediator than they would before the court itself.

Mr. BROOKS. One they appointed—one the court appointed.

Mr. RICHARDSON. Yes, one was appointed, but there had been a press release from the Department announcing that they were seeking mediation, and this was a violation of the court rules.

We were not, however, at the outset, prepared to rely on this as a reason for terminating the mediation, but we got a subsequent letter from the Circuit Executive of the District of Columbia Circuit calling attention to this situation, and we replied in early November to the effect that we thought that the circumstances called for the termination of the mediation process, and in my letter to her, Linda J. Finkelstein, of November 8, 1990, I referred to a number of other newspaper reports about the mediation process.

Mr. BROOKS. To Mr. Work and Mr. Richardson: Do you share the Hamiltons' belief that the highest levels of the Department of Justice may have criminally conspired to injure INSLAW?

Mr. Work.

Mr. WORK. We do, Mr. Chairman. We believe, both Mr. Richardson and I, that substantial evidence of a criminal conspiracy exists. We would not have put our names to the writ of mandamus that was filed before Judge Bryant, nor would we have requested the appointment of an independent counsel, had we not believed that a full and fair criminal investigation is mandated by these facts.

Mr. BROOKS. Mr. Ambassador, do you agree with Attorney General Thornburgh's position that the Department has the right to withhold documents from the committee based on attorney-client or attorney work product privilege?

Mr. RICHARDSON. No, I do not, Mr. Chairman, and I can't imagine any basis on which the attorney-client privilege or the attorney's work product privilege would have any bearing in the rela-

tionship between two coordinate branches of the Government of the United States. This committee, of course, has convened this hearing in the exercise of its oversight function. Its investigation has been a pursuit of that responsibility, and so the policy considerations underlying these privileges clearly have no applicability in that relationship.

Mr. BROOKS. And, Mr. Ambassador, what issues did INSLAW raise in its writ of mandamus, and how did the court respond to these issues in its ruling?

Mr. RICHARDSON. The basic issue we raised, Mr. Chairman, was that the Department, having failed to carry out its duty to investigate as part of its duty to enforce the law, and having also failed in its duty of fairness to INSLAW as a civil litigant, had to be compelled to carry out these duties because there was no other way in which INSLAW could receive adequate redress. We argued that, notwithstanding the general principle that a court will not second guess a prosecutor, the circumstances here were so extreme in degree that this principle of nonintervention should not be made absolute.

The court's opinion, in effect, does give it absolute force. It is, in effect, an opinion that a court will never—no matter how extreme the allegations of abuse of discretion or neglect of duty against a prosecutorial authority, a court will never inquire. I respectfully submit that that conclusion is wrong, but that is the conclusion the court reached, and that is the reason why it also noted, in language I quoted earlier in my statement, that the only remaining recourse for full inquiry into the neglect of duty by the Department is this committee.

Mr. BROOKS. Mr. Fish, the gentleman from New York—the reelected gentleman from New York.

Mr. FISH. Thank you, Mr. Chairman.

Ambassador Richardson, I was privileged to be present at your swearing in as Attorney General of the United States, and I took the liberty for many years after that of quoting something you said about the fault not being in institutions of the country, and I am sure you know that this committee has a record of sharing the high standards for the Department of Justice, their conduct as well as their example, that you have enunciated.

I think it is one thing to allege that Department of Justice personnel have engaged in improper conduct, but I think it is another thing to allege improper conduct by the Public Integrity Section of the Criminal Division, a section whose job it is to deal with abusive practices by Government officials.

You state in your written submission—"[T]he Public Integrity Section of the Criminal Division initiated a cursory review of INSLAW's charges, but made no serious attempt to determine their validity." Now this testimony appears to me to suggest that the Public Integrity Section acted out of improper motives, purposely acted not to uncover wrongdoing, limiting itself to a superficial review. If that is your position, do you have any direct evidence to support it?

Mr. RICHARDSON. No direct evidence, Congressman Fish. The evidence that the investigation was cursory and superficial is largely the evidence I touched on when I said that our allegations are

based on the statements of 30 different individuals. A series of communications by us to the Department have identified all of those individuals, or most of them, and identified other leads.

I referred earlier and asked to have put into the record my own letter to Attorney General Thornburgh dated May 11, 1989. That letter alludes to many of these same individuals and these same leads, and I have never received a reply, and so when we concluded that our only remaining remedy was a petition of mandamus, we recontacted all 30 of these individuals to find out whether any of them had ever received any communication or any inquiry from a representative of the Department of Justice. Only one had, and she is a New York judge who repeated to them what she had earlier said to us. The other 29 have never been approached, but everything we set forth in our petition for mandamus, everything we have said here today, derives from the information given to us by those 30 people, and we think, therefore, that the inference is inescapable that the investigation could not have been thorough. The Department did not seek to know or to find out whence we derived these allegations.

Mr. FISH. So that improper motive is your conclusion for the Section not having pursued this beyond one of the 30 individuals.

Mr. Richardson, litigation privilege is at issue here. My question is, would INSLAW and its attorneys be prepared to waive attorney-client privilege and the protections normally accorded attorney work product and give the Committee on the Judiciary unlimited access to any notes or papers relating to this case—and, if not, is it fair for this committee to require the Department of Justice to turn over work product and attorney-client documents?

Mr. RICHARDSON. Well, I would like hastily to consult Mr. Work, or I'll give him a moment to dissent, but I would unhesitatingly say we would be willing to do so.

Mr. WORK. We need to talk to the client here.

Mr. RICHARDSON. We are agreed, Congressman Fish, that we would be willing to do so.

But I would like to make a further point in this connection. We are not—in my response to Chairman Brooks on the issue of privilege, I was talking solely about the relationship between this committee and the Department of Justice, I wasn't suggesting that we should have access to those documents, and the Department clearly does have an attorney-client privilege and an attorney work product privilege as against us. So the question whether these documents should be made public and thus available to us is a very different question than whether they should be made available to the committee.

Mr. FISH. It is a question, Ambassador, that I look forward to exploring in some detail with Steven Ross, the counsel to the Clerk of the House, because that is the constitutional issue that he poses. I might add, though, I can't remember a time in my 22 years on this committee that where we obtained documents, including during the impeachment, confidential documents from the grand jury, that we didn't at some later time make them public.

In response to the chairman, you said you saw no policy applicable to the Department of Justice withholding documents from the Congress, and I guess my question is that, if this committee were to

obtain these documents and then were to release them—documents that contain privileged lawyer-client communications, discussion of litigation strategy, attorney work product, et cetera—and these are not available to INSLAW through discovery but you get them because we publish them, might not INSLAW be able to make some use of such information in further litigation that I think is anticipated in this case?

Mr. RICHARDSON. That is possible, Mr. Fish, but I think the committee would need deliberately to consider whether or not to make them public. In my various Government positions, I have had frequent occasion to negotiate with committees the exact conditions under which information would be made available. As early as 1969, I dealt with Senator Symington in connection with the actions of the United States involving the bombing of Cambodia; later on, in connection with the confirmation hearings of Secretary Kissinger, I dealt with the Committee on Foreign Relations with regard to taps on the phones of various White House staff people; and, in each case, the understandings on which the documents were made available were observed; and, of course, the Intelligence Committees on both sides have the confidence of the executive branch with respect to the integrity of the committees' custody of the information made available; and I have no doubt whatsoever that this committee is equally capable of maintaining the confidentiality of information furnished to it if it should decide and agree with the Department of Justice that it should be kept confidential.

Mr. FISH. One further question addressed to anybody who wants to answer it: How much, in your view, has INSLAW actually suffered in financial terms as a result of improper conduct by the Department of Justice?

Mr. RICHARDSON. I would like to say one thing briefly before asking the Hamiltons to respond to that, Mr. Fish. We have done quite a little work on that in the event that the Government ever made us an offer of settlement, which they never have, but—and I would just say in that connection that the direct damages are only a very small fraction of the consequential damages that resulted from business lost to INSLAW.

Let me ask the Hamiltons to expand on that.

Mr. HAMILTON. Mr. Fish, we had signed contracts with three or four Fortune 500 companies before the bankruptcy for joint product development and comarketing on a nationwide basis of our software to the legal community. We have estimated our lost profits, in part, based on information that we obtained from those companies through subpoena—one contract alone, the company's internal documents forecasted paying INSLAW between $30 and $40 million in royalty payments over a 5-year period. The total estimate of those consequential damages is several hundred million dollars.

Mr. FISH. Thank you, Mr. Chairman. I have no further questions.

Mr. BROOKS. Mr. Edwards, the gentleman from California.

Mr. EDWARDS. Thank you, Mr. Chairman, and I join you in welcoming our distinguished guests, and especially the former Attorney General.

Mr. Richardson, is it your view that in-house legal opinions from staff to the Attorney General are privileged and not subject to subpoena by the Congress?

Mr. RICHARDSON. They would seem to be privileged as against us. I don't see any reason why they should be privileged as against this committee. I know of no basis on which the executive branch can justify withholding information from the Congress except that of executive privilege, whose scope, of course, is cloudy, but—and so I do not see any basis in the circumstances for saying that legal deliberations fall within executive privilege.

Mr. EDWARDS. Lawyer-client privilege? I mean, that would not be a valid basis?

Mr. RICHARDSON. The attorney-client privilege would be relevant, of course, only in the context of litigation, and, as I said earlier, we would recognize that the attorney-client privilege is clearly valid as between the Department of Justice and us as civil litigants but—and the policy considerations underlying the privilege are well understood and valid in that context but not in the context of the legislative-executive relationship where they have no applicability.

Mr. EDWARDS. Thank you very much. That is very helpful.

Mr. BROOKS. Mr. Campbell, the gentleman from California.

Mr. CAMPBELL. Thank you, Mr. Chairman.

I wish to preface my remarks by the statement that it is my hope that this disagreement can be worked out amicably, although I know that may be overly optimistic. It seems to me that perhaps the best approach would be an in camera submission if there are truly concerns by the Department of Justice about confidentiality, attorney-client, or work product, so that this committee could have access to the documents necessary for its oversight without jeopardizing the interests that lay behind those privileges.

Also by way of introduction, I want to make it clear that I do not know yet enough as to whether any of the documents at issue here are legitimately the subject of attorney-client or work product.

But with that background, I would like to put a question to Ambassador Richardson.

Your testimony appears to espouse the view that attorney-client privilege and work product privilege have meaning only in litigation, and that is a view that I dispute for the reason that I will put forward to you and I would welcome your rebuttal.

If, for example, we were speaking of doctor-patient privilege, one would say the reason for doctor-patient privilege is to induce the patient to be completely forthcoming with her doctor, or his doctor, and that that policy is jeopardized if the content of that communication is subsequently made available to another party, even if not to the party opposed in litigation, and even if not spread upon the public record, but that there is a purpose to privilege other than keeping documents from the opposing litigant. Priest-penitent would be another such instance where one would say, "I'm not telling the other side, I'm only telling Congress." One would nevertheless say that jeopardizes the fundamental policy purpose behind the privilege.

So here if, by hypothesis, it is truly attorney-client—which I understand is an open question, but if it were—it strikes me that it is contrary to the position that you hold and that it does have meaning beyond the interest of the opposing litigant, or to put it succinctly, hopefully, that it is not so much the incapacitation of the

litigation process that is at issue as it is the underlying policy of allowing full communication between an attorney and her client.

I'd be very happy for your response on that point.

Mr. RICHARDSON. I would be glad to respond, and I think my colleague, Mr. Work, would like to add a few words. But let me say briefly, Congressman Campbell, that I think the analogy to the doctor-patient privilege is not apt. I think you correctly characterize the underlying considerations supporting that privilege, but I am unaware of any comparable consideration underlying the attorney-client privilege in a litigated situation. The justification for it is tactical; it is predicated on the fundamental proposition that our litigating system is adversarial, and you just don't tip your hand to the other side, you don't undercut your litigating strategy or tactics, and that is a fundamentally different kind of rationale.

The rationale you cite underlying the doctor-patient relationship is comparable to the one ordinarily used to justify "executive privilege." It is said that if you make available to the Congress the advice given by staff people to the President, for example, that this may inhibit the freedom with which they give that advice, and that is an argument, as you are, of course, well aware, that has swirled around the relationship between the executive and legislative branches for over 200 years.

But I don't think that that consideration is significant here, and it has not been suggested that the Department of Justice is invoking executive privilege.

Mr. CAMPBELL. Before hearing from Mr. Work—and I do wish to hear from him—it is a point between law professors perhaps which is appropriate then to litigate, but it strikes me that if your position were right, Ambassador Richardson, then after the conclusion of litigation when the case is closed and the matter is subject to judgment and bar from further litigation, that one would then be able to obtain from the opposing side in the context of some other proceeding attorney-client communications because, the case being closed, there is no tactical advantage, and yet we know that is not the case in the United States nor in any common law jurisdiction.

So it strikes me that attorney-client privilege is broader than tactical. If I am wrong in that, I would welcome hearing your response and also Mr. Work's response.

Mr. RICHARDSON. All I can say to that, Mr. Campbell, is that I would not, on the face of it, exclude the policy consideration that the past relationship between the parties, which was adversarial, may conjecturally continue in the future and that, as a matter of prudence, therefore, in the absence of any strong policy consideration the other way, the privilege should be maintained.

But I would just add that, if one is talking about policy considerations, there should be noted in this context the powerful policy considerations underlying the ability of this committee to carry out its oversight function.

Mr. CAMPBELL. Surely.

Mr. RICHARDSON. And that, I would submit, clearly outweighs whatever marginal considerations may attend the purely interpersonal relations of the litigants.

Mr. CAMPBELL. And with that I agree if we get into the debate as to whether attorney-client in a particular context trumps congres-

sional need for oversight. Indeed, the issues were put in a case with which you have intimate familiarity called *United States* v. *Nixon* in which the court identified exactly who wins when there is a conflict of priorities.

But what struck me in your opening testimony as a point of controversy was that there was no attorney-client. I would say there may well be; we will have to ascertain the documents to see if that is the case; but if there is, then it is a question for the court to weigh as to whether congressional need for oversight trumps. That, to me, though, is putting the issue differently.

Mr. RICHARDSON. Well, I would have to say that I think your analysis is better than the one that was implicit in what I originally said insofar as you say that there may be some relevance even in the executive-legislative context for the policy considerations underlying the privilege. To the extent that is true, then it would follow that one has to address the factors outweighing it, and I would accept that analysis.

Mr. CAMPBELL. I appreciate your candor.

Mr. Work.

Mr. WORK. Thank you, Mr. Campbell.

Two brief points. The first is that, clearly, this committee, in its oversight function, can explore, and has the authority to explore, whether the attorney-client privilege is being abused by the Department of Justice. Second, it is not necessarily true—and, again, this is a point law professors might debate, as you said—it is not necessarily true that these privileges would evaporate as to INSLAW even if these documents were to be made public by this committee.

Mr. CAMPBELL. Fair enough.

In conclusion, I wish to say, again, it strikes me that a compromise is the right course here. I look forward later no doubt, Mr. Chairman, to hearing from the Department of Justice as to what has prevented them from reaching a compromise, and I yield back the balance of my time.

Mr. BROOKS. Thank you very much, Mr. Campbell.

Thank you very much, gentlemen. Thank you, Ambassador, for your usual candid, and objective, and principled approach to problems.

Mr. RICHARDSON. Thank you very much, Mr. Chairman. I know I speak for all the members of the panel in thanking you and the subcommittee for this opportunity to appear before you.

Mr. BROOKS. Well, we are delighted to see you again and to see you looking so well and enjoying life.

Mr. RICHARDSON. May I return the compliment and congratulate you in return.

Mr. BROOKS. Our next witness is Judge George Bason, Jr. As I mentioned in my opening statement, it was Judge Bason who originally heard the INSLAW case before I ever heard about it. Prior to his service on the Bankruptcy Court from 1984 to 1988, Judge Bason had over 12 years of private practice specializing in bankruptcy and reorganization law.

Judge, we thank you very much for taking your time to be with us this morning. I might note that, despite your good work, outstanding work, at the Bankruptcy Court, you were not reappointed

to the court when your term expired in 1988. Ironically, one of the Justice Department attorneys who tried the INSLAW case ended up getting your job.

Your prepared statement will be made a part of the record, every word, and if you would raise your right hand.

[Witness sworn.]

Mr. BROOKS. And we would hope that you would summarize that statement so we can have a few questions, Judge. We are delighted to have you here.

STATEMENT OF JUDGE GEORGE F. BASON, JR.

Judge BASON. Thank you, Mr. Chairman and members of the subcommittee. I am happy to respond to your request to give testimony that may help the committee in its investigation. I understand you would like me to make a brief statement at this time and then answer questions.

I have come to believe that my nonreappointment as bankruptcy judge was the result of improper influence from within the Justice Department which the current appointment process failed to prevent. I was the sole bankruptcy judge for the District of Columbia from February 8, 1984, through February 7, 1988. Therefore, I was the trial judge who personally heard the testimony and observed the witnesses in INSLAW. The judicial opinions that I rendered reflected my sense of moral outrage that, as the evidence showed and as I held, the Justice Department stole INSLAW's valuable property and tried to drive INSLAW out of business. Those opinions were upheld on appeal by Judge Bryant in a memorandum that noted my "attention to detail" and "mastery of the evidence."

Very soon after I rendered those opinions, my application for reappointment was turned down. One of the Justice Department attorneys who argued the INSLAW case before me was appointed in my stead. Although over 90 percent of the incumbent bankruptcy judges who sought reappointment were in fact reappointed, I was not among them.

In this case, several circumstances indicate that the decision of the Merit Selection Panel, which was the initial body considering my application, must have been the result of some improper interference with its processes.

Congress required that "equal consideration to that given all other" candidates must be given to incumbent bankruptcy judges. Under that mandate, my qualifications were so far superior to my successor's that, on the merits, no rational person could have chosen him over me.

Merit must of course be judged both from the written record—my resume and opinions—and from my reputation amongst the judges and bankruptcy practitioners who knew me. My resume speaks for itself; my opinions have been cited often and reversed seldom; my successor had scant bankruptcy experience and, of course, no opinions. I have attached to my written statement excerpts from numerous letters attesting to my reputation among practitioners.

Despite a regulation requiring that at least one member of the Merit Selection Panel be "an attorney with a predominantly bank-

ruptcy practice in the District of Columbia," so far as I know, no member of the panel had ever appeared even once in the Bankruptcy Court for the District of Columbia. Hence, no member of the panel had first-hand knowledge of my capabilities as a judge.

The panel failed to interview District Court Chief Judge Aubrey Robinson, who exercised general supervisory authority over administrative aspects of the Bankruptcy Court and whose name I specifically suggested to the panel.

Every year during my tenure, Chief Judge Robinson praised my performance as bankruptcy judge. For example, in his May 1986 annual report to the D.C. Circuit Judicial Conference, he noted that despite "increased case load . . . the Bankruptcy Court is basically current" because of Judge Bason's "extraordinary efforts, perseverance, and hard work."

At no time did the panel or any member of the panel provide any notice to me that it had received any adverse comments about me from any source or that it had any concerns about any aspect of my performance as a judge. Therefore, I never had any opportunity to respond to any such comments or concerns.

I have repeatedly sought and repeatedly been denied any official explanation of why the decision not to reappoint me was made. The only explanation ever offered to me, even informally, related to inefficiency in the Bankruptcy Clerk's Office and obviously lacked any basis in fact for reasons which I have detailed in my written statement.

Appeals Court Chief Judge Patricia Wald's words to me when she told me I was not to be reappointed were, "Life is unfair." The strong implication was that she knew the decision was not justified on the merits. I was shocked when I heard that from her. I couldn't believe that such a decision was possible. Others shared that reaction.

A number of the district judge members of the Judicial Council, when they received the Merit Selection Panel's report, were so dismayed at the panel's failure to recommend my reappointment that they caucused to see if there was anything they could do to reverse the process. They concluded that there was unfortunately no time left.

When the chairmen of the bankruptcy committees of the two largest bar associations in the District of Columbia found out about the decision not to reappoint me, they too looked for ways to reverse that decision, and they too concluded there wasn't time.

New information has come to my attention since I left the bench that leaves no doubt in my mind that the Justice Department itself did manipulate the process before the Merit Selection Panel. First, I learned that in late March 1987 the following occurred. I expressed concern about, "Justice Department people . . . talking to" an important witness "outside the presence of [INSLAW's] counsel about the subject matter of his testimony and without notice." Then it developed the witness had recanted his testimony that was favorable to INSLAW immediately after being contacted by a former Justice Department colleague. And then one of the Justice Department's lawyers was heard saying to another, "We've got to get rid of that judge."

Second, in about May 1988, a news reporter who told me he had excellent contacts and sources of information within the Justice Department suggested that the Justice Department could have procured my removal by the following means: The district judge chairperson of the Merit Selection Panel could have been approached privately and informally by one of her old and trusted friends from her days in the Justice Department. He could have told her that I was mentally unbalanced, as evidenced by my unusually forceful "anti-government" opinions. Her persuasive powers coupled with the fact that other members of the panel or their law firms might appear before her as litigating attorneys could cause them to vote with her.

Later, that same reporter telephoned me and confirmed that, in fact, a high Justice Department official had boasted to him that Bason's removal was because of his INSLAW rulings.

If Justice Department officials were willing to steal from and try to liquidate INSLAW and then to lie about it under oath, there is every reason to believe they would not hesitate to do whatever was necessary and possible to remove from office the judge who first exposed their wrongdoing. I can no longer escape the conclusion that most knowledgeable lawyers in Washington reached long ago. I would not have lost my job as bankruptcy judge but for my rulings in the INSLAW case.

I have been told by legal search firms that I am now considered to be too controversial a figure to be employable by any of the large law firms. I am paying the full price for doing my duty to render equal justice without regard to rank or position. As a judge, I could not and would not do otherwise.

The independence of the judiciary and the separation of powers are among the glories of our form of government. It strikes at the heart of those principles for the Justice Department to retaliate against a judge by causing his removal. Such retaliation is the mark of a police state, not of democratic America.

Thank you.

Mr. BROOKS. Thank you, Judge.

[Judge Bason's prepared statement follows:]

Opening Statement, Testimony by George Francis Bason, Jr.
Before the Committee on the Judiciary, House of Representatives

I am happy to respond to your request to give testimony that may help the Committee in its investigation. I understand that you would like me to make a brief statement concerning my personal experiences as a candidate for judicial reappointment, and then to respond to your questions concerning Inslaw and the Justice Department and concerning my recommendations for legislation to improve the appointment process.

I have come to believe my non-reappointment was the result of improper influence from within the Justice Department which the current appointment process failed to prevent.

I was the sole United States Bankruptcy Judge for the District of Columbia from February 8, 1984 through February 7, 1988. As such, I was the trial judge who personally heard the testimony and observed the witnesses in the matter of Inslaw v. U.S.Department of Justice. The judicial opinions that I rendered reflected my sense of moral outrage that, as the evidence showed and as I held, the Justice Department stole Inslaw's valuable property and tried to drive Inslaw out of business.

Those opinions were upheld on appeal by Senior U.S. District Judge William Bryant, in a memorandum that noted my "attention to detail" and "mastery of the evidence."

Very soon after I rendered those opinions my application for reappointment as bankruptcy judge was turned down. One of the Justice Department attorneys who had argued the Inslaw case before me was appointed in my stead. Although over 90% of the incumbent bankruptcy judges who sought reappointment were in fact reappointed, I was not among them.

My application for reappointment went through the statutory three-step process for selection of bankruptcy judges.

- First, a four-member Merit Selection Panel (including one judge) screened all of the candidates. That Panel passed on four names to the Judicial Council. My successor's name was ranked first and my own name was further down.

- Second, the Judicial Council passed on to the Court of Appeals, without any independent recommendation, the names of three of the four candidates, including mine.

- Third, the judges of the Court of Appeals made the final selection.

Congress designed this procedure in an attempt to insure that bankruptcy judges would be selected on the basis of merit.

However in this case several circumstances indicate that the decision of the Merit Selection Panel must have been the result of some improper interference with its processes.

- In order to forestall discrimination against incumbents, Congress included a specific provision in the statute requiring that incumbent bankruptcy judges seeking reappointment be given "equal consideration to that given all other" candidates. Under the "equal consideration" mandate, my qualifications were so far superior to my successor's that on the merits no rational person could have chosen him over me.

Merit must of course be judged both from the written record - my resume and opinions - and from my reputation amongst the judges and bankruptcy practitioners who knew me. My resume speaks for

itself and my opinions have been cited often and reversed seldom. My successor had scant bankruptcy experience and of course no opinions. My resume, with excerpts from numerous letters attesting to my reputation amongst practitioners, is attached as Exhibit A.

● Despite a regulation requiring that at least one member of the Panel be "an attorney with a predominantly bankruptcy practice in the District of Columbia," so far as I know no member of the Panel had ever appeared, even once, in the Bankruptcy Court for the District of Columbia.

Hence, no member of the Panel had first-hand knowledge of my capabilities as a judge.

● The Panel failed to interview District Court Chief Judge Aubrey Robinson, who exercised general supervisory authority over administrative aspects of the Bankruptcy Court and whose name I had specifically suggested to the Panel.

Every year during my tenure Chief Judge Robinson, in his annual reports to the D. C. Circuit Judicial Conference, praised my performance as Bankruptcy Judge. For example, in May 1986 he noted that, despite "increased case load . . . the Bankruptcy Court is basically current" because of my "extraordinary efforts, perseverance and hard work." Again in May 1987 he stated: "We are all indebted to Judge Bason, for his untiring efforts have produced adjudications of the highest quality."

● At no time did the Panel or any member of the Panel provide any notice to me that it had received any adverse comments about me from any source, or that it had any concerns about any aspect of my performance as a judge.

Therefore, I never had any opportunity to respond to any such comments or concerns.

- I have repeatedly sought and have repeatedly been denied any official explanation of why the decision not to reappoint me was made. The only explanation ever offered to me, even informally, related to inefficiency in the Bankruptcy Clerk's office and obviously lacked any basis in fact.
  - The running of the Clerk's office was not my direct responsibility and was not among the statutory criteria that the Merit Selection Panel was to apply.
  - The person that I hired to clean up the previous problems in the Clerk's office is still there.
  - The Merit Selection Panel never interviewed the new Clerk or anyone else in the Clerk's Office.
  - During all my years on the bench, no one had ever suggested to me that there was any problem with my performance in regard to the Clerk's Office.
- Appeals Court Chief Judge Patricia Wald's words to me when she told me I was not to be reappointed were, "Life is unfair." The strong implication was that she knew the decision was not justified on the merits. I was shocked; I could not believe that such a decision was possible. Others shared that reaction.

A number of the District Judge members of the Judicial Council, when they received the Merit Selection Panel's report, were so dismayed at the Panel's failure to recommend my reappointment that they caucused to see if there was anything they could do to reverse the process. They concluded that unfortunately there was no time to do so.

When the Chairmen of the Bankruptcy Committees of the two largest Bar Associations in the District of Columbia found out about the decision not to reappoint me, they too looked for ways to reverse that decision and they too concluded that unfortunately it was by then too late.

For a long time I resisted the obvious explanation for the bizarre decision by the Merit Selection Panel which led to my non-reappointment: that the process had been manipulated. But new information has come to my attention since I left the bench that leaves no doubt in my mind that the Justice Department itself did manipulate the process.

- First, I have learned that, in late March 1987, the following occurred. I expressed "concern" about "Justice Department people . . . talking to" an important witness "outside the presence of [Inslaw's] counsel about the subject matter of his testimony, and without notice." Then it developed that the witness had recanted his testimony that was favorable to Inslaw immediately after being contacted by a former Justice Department colleague. And then one of the Justice Department's lawyers was heard saying to another that we've got to get rid of this judge.

- Second, in about May 1988, a news reporter who told me he had excellent contacts and sources of information within the Justice

Department, suggested that the Justice Department could have procured my removal by the following means:

> The District Judge Chairperson of the Merit Selection Panel could have been approached privately and informally by one of her old and trusted friends from her days in the Justice Department. He could have told her that I was mentally unbalanced, as evidenced by my unusually forceful "anti-Government" opinions. Her persuasive powers, coupled with the fact that other members of the Panel or their law firms might appear before her as litigating attorneys, could cause them to vote with her.

Later that same reporter telephoned and confirmed that in fact a high Justice Department official had boasted to him that Bason's removal was because of his Inslaw rulings.

If Justice Department officials were willing to steal from and try to liquidate Inslaw, and then to lie about it under oath, there is every reason to believe they would not hesitate to do whatever was necessary and possible to remove from office the Judge who first exposed their wrongdoing and who would otherwise then be in a position to make further adverse rulings.

I can no longer escape the conclusion that most knowledgeable lawyers in Washington reached long ago. I would not have lost my job as bankruptcy judge but for my rulings in the Inslaw case.

I have been told by legal search firms that I am now considered to be too controversial a figure to be employable by any of the large law firms. I am paying the full price for doing my duty to render equal justice without regard to rank or position. As a Judge I could not and would not do otherwise.

The independence of the judiciary and the separation of powers are among the glories of our form of Government. It strikes at the heart of those principles for the Justice Department to retaliate against a judge by causing his removal. Such retaliation is the mark of a police state, not of democratic America.

Thank you for your attention.

* * * * *

EXHIBIT A

George Francis Bason, Jr.
1025 Thomas Jefferson Street, N.W.
Suite 500 East
Washington, D.C. 20016
(202) 337-4224
Telecopier: (202) 342-5446

BIOGRAPHICAL DATA

Experience

Feb. 1984- Feb. 1988	Judge, United States Bankruptcy Court, Washington, D.C.	Major cases include United Press International, Inc.; Auto-Train Corporation; Inslaw, Inc. v. U.S. Seventy published opinions (see attached list). Co-chair, 1985-86, Committee on U.S. Bankruptcy Courts, National Conference of Special Court Judges, American Bar Association.
July 1972-Jan. 1984	Solo practice, George F. Bason, Jr. (P.C. 1978-1984), Washington, D.C.	Civil practice, specializing in bankruptcy and reorganization law. Trustee for Wage Earner Plans in the District of Columbia, 1972-75. Chair, D.C. Bar Committee on Bankruptcy and Reorganizations, 1974-75.
Sept. 1966-June 1972	Associate (1969-72) and Assistant (1966-69) Professor of Law, The American University, Washington College of Law, Washington, D.C.	Co-founder and Faculty Advisor, A.U. Legal Aid Services (recipient of four A.B.A. awards). Co-founder and first chairman of the Board, D.C. Law Students in Court. Faculty Coordinator, A.U. Clinical Legal Education Program. Founder and first Director, A.U. Criminal Litigation Clinic. Awards for outstanding service to law school, legal aid, and clinical legal education.
Jan. 1962-Aug. 1966	Associate, Martin, Kunen & Whitfield, Washington, D.C.	Corporate practice, with particular emphasis upon banking and commercial law, bankruptcy, and transactions before administrative agencies.
Feb. 1958-Dec. 1961	Associate, Royall, Koegel & Wells (now Rogers & Wells), Washington, D.C.	Corporate practice, with particular emphasis upon antitrust law, litigation, and transactions before administrative agencies and executive departments.
Aug. 1956-Jan. 1958	Associate, Chas. G. Rose, Jr., Fayetteville, N.C.	Civil practice, with particular emphasis upon real estate transactions.

George Francis Bason, Jr., page 2

Published Materials include:

Author, *Debtor and Creditor Relations*, 3 vols., in *West's Legal Forms 2d* (1984).

Co-Author, *Collier on Bankruptcy*, Vols. 2 and 10 (1975 rev.)

"To Enforce These Rights," 1973 *Wisc. L. Rev.* 1085 (1974) (received first prize, American Bar Essay Contest on Constitutional Law)

Education

Legal	Harvard Law School, Cambridge, Mass., J.D., *cum laude*, 1956	**Standing:** 73/452 (within top 17 percent) **Honors:** Senior Director, Harvard Legal Aid Bureau
College	Davidson College, Davidson, N.C., A.B., *cum laude*, 1953	**Standing:** Salutatorian (top 2 percent) **Honors:** Phi Beta Kappa; honors course in English Constitutional History
Preparatory	The Hill School, Pottstown, Penna.	**Standing:** Within top 5 percent **Honors:** Cum Laude Society; honors course

Admitted to Practice Before:

Supreme Court of the United States; United States Court of Appeals for the District of Columbia Circuit; District of Columbia Court of Appeals; Supreme Court of North Carolina.

Member:

American Bankruptcy Institute; American Bar Association; Bar Association of the District of Columbia; District of Columbia Bar; National Conference of Bankruptcy Judges.

Personal Data

Age 57. Married to Sheilah M.W. Bason. Two sons: Neil (26) and Iain (24). Excellent health.

George Francis Bason, Jr.
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Washington, D.C. 20016
(202) 966-7335

A. **Major Cases**

1. In re Hillandale Development Corp. ($40 million, Clint-Murchison-backed development on the Archbold Mansion site).

2. In re United Press International, Inc. (UPI successfully reorganized through a $40 million sale in little more than a year; more than 5,000 creditors).

3. In re Auto-Train Corp. (first railroad reorganization case under new Bankruptcy Code; more than 20,000 creditors).

4. In re Inslaw, Inc.; Inslaw Inc. v. United States Department of Justice (multi-million dollar claim by debtor against Department of Justice ("DOJ"), resulting in recently printed findings and conclusions, holding that DOJ converted Inslaw's property by trickery, fraud, and deceit and tried to force Inslaw into Chapter 7 liquidation bankruptcy).

B. **Published Opinions**

1. In re Inslaw, Inc. (Inslaw, Inc. v. United States), 88 Bankr. 484 (Bankr. D.C. 1988).
2. In re Tariff Resources, Inc., 83 Bankr. 176 (Bankr. D.C. 1988).
3. In re Inslaw, Inc. (Inslaw, Inc. v. United States), 83 Bankr. 89 (Bankr. D.C. 1988).
4. In re Shields, 82 Bankr. 171 (Bankr. D.C. 1988).
5. In re Hawkins, 81 Bankr. 183 (Bankr. D.C. 1988).
6. In re Cafe Partners/Washington 1983, 81 Bankr. 175, 17 B.C.D. 320 (Bankr. D.C. 1988).
7. In re Mitchell, 81 Bankr. 171 (Bankr. D.C. 1988).
8. In re Inslaw, Inc., 81 Bankr. 169 (Bankr. D.C. 1988).
9. In re Jones, 80 Bankr. 597, 16 B.C.D. 1256 (Bankr. D.C. 1988).
10. In re Inslaw, Inc. (Inslaw, Inc. v. United States), 76 Bankr. 224 (Bankr. D.C. 1987).
11. In re White, 73 Bankr. 983 (Bankr. D.C. 1987).
12. In re Minick, 63 Bankr. 440, 14 B.C.D. 921, Bankr. L. Rep. p. 71,417 (Bankr. D.C. 1986).

13. In re Auto-Pak, Inc., 63 Bankr. 321 (Bankr. D.C. 1986).
14. In re Jephunneh Lawrence & Assocs. Chtd., 63 Bankr. 318, 15 C.B.C.2d 742 (Bankr. D.C. 1986).
15. In re Leonard, 63 Bankr. 261 (Bankr. D.C. 1986).
16. In re 12th & N Joint Venture, 63 Bankr. 36, 15 C.B.C.2d 466 (Bankr. D.C. 1986).
17. In re United Press International, Inc., 60 Bankr. 265, 14 B.C.D. 425, Bankr. L. Rep. p. 71,135 (Bankr. D.C. 1986).
18. In re L.A. Clarke & Son, Inc. 59 Bankr. 856 (Bankr. D.C. 1986).
19. In re J.J. Mellon's, Inc., 59 Bankr. 598 (Bankr. D.C. 1986).
20. In re Myers, 60 Bankr. 108 (Bankr. D.C. 1986).
21. In re Colbert, 57 Bankr. 600 (Bankr. D.C. 1986).
22. In re Auto-Train Corp., 57 Bankr. 566, Bankr. L. Rep. p. 71,017 (Bankr. D.C. 1986).
23. In re Community Churches of America, 57 Bankr. 562 (Bankr. D.C. 1986).
24. In re Yaffe, 58 Bankr. 26 (Bankr. D.C. 1986).
25. In re The President of the United States, 88 Bankr. 1 (Bankr. D.C. 1985).
26. In re Villa Roel, Inc., 57 Bankr. 879, 14 C.B.C.2d 523 (Bankr. D.C. 1985).
27. In re Fields, 55 Bankr. 294 (Bankr. D.C. 1985).
28. In re Auto-Pak, Inc., 55 Bankr. 407 (Bankr. D.C. 1985).
29. In re Inslaw, Inc., 55 Bankr. 502, 13 C.B.C.2d 1131 (Bankr. D.C. 1985).
30. In re Leonard, 55 Bankr. 106, 13 C.B.C.2d 1189, 13 B.C.D. 1003, Bankr. L. Rep. p. 70,867 (Bankr. D.C. 1985).
31. In re Kragh, 55 Bankr. 88 (Bankr. D.C. 1985).
32. In re Wing, 55 Bankr. 91 (Bankr. D.C. 1985).
33. In re Gardner, 55 Bankr. 89 (Bankr. D.C. 1985).
34. In re J.J. Mellon's, Inc., 57 Bankr. 437, 14 B.C.D. 35 (Bankr. D.C. 1985).
35. In re Blackman, 55 Bankr. 437, 13 B.C.D. 1013, Bankr. L. Rep. p. 70,866 (Bankr. D.C. 1985).
36. In re Auto-Pak, Inc., 55 Bankr. 406 (Bankr. D.C. 1985).
37. In re Auto-Train Corp., 55 Bankr. 69 (Bankr. D.C. 1985).
38. In re Villa Roel, Inc., 57 Bankr. 835 (Bankr. D.C. 1985).
39. In re United Press International, Inc., 55 Bankr. 63 (Bankr. D.C. 1985).
40. In re Miller, 55 Bankr. 49 (Bankr. D.C. 1985).
41. In re Auto-Pak, Inc., 55 Bankr. 403 (Bankr. D.C. 1985).

42. In re Leonard, 51 Bankr. 53 (Bankr. D.C. 1985).
43. In re Rea, 57 Bankr. 834 (Bankr. D.C. 1985).
44. In re La Boucherie Bernard, Ltd., 55 Bankr. 23 (Bankr. D.C. 1985).
45. In re La Boucherie Bernard, Ltd., 55 Bankr. 22 (Bankr. D.C. 1985).
46. In re B & F Associates, Inc., 55 Bankr. 19 (Bankr. D.C. 1985).
47. In re Ted Liu's Szechuan Garden, Inc., 55 Bankr. 8 (Bankr. D.C. 1985).
48. In re D.C. Diamond Head, Inc., 51 Bankr. 309 (Bankr. D.C. 1985).
49. In re Inslaw, Inc., 51 Bankr. 298 (Bankr. D.C. 1985).
50. In re L.A. Clarke & Son, Inc. 51 Bankr. 31, 13 B.C.D. 452 (Bankr. D.C. 1985).
51. In re Carey, 51 Bankr. 294 (Bankr. D.C. 1985).
52. In re Auto-Pak, Inc., 52 Bankr. 3 (Bankr. D.C. 1985).
53. In re Sator, 51 Bankr. 30 (Bankr. D.C. 1985).
54. In re Wright, 51 Bankr. 669 (Bankr. D.C. 1985).
55. In re Chapman, 51 Bankr. 663 (Bankr. D.C. 1985).
56. In re Shorts, 63 Bankr. 2, 14 B.C.D. 920 (Bankr. D.C. 1985).
57. In re Brown, 51 Bankr. 284 (Bankr. D.C. 1985).
58. In re Robertson, 51 Bankr. 20 (Bankr. D.C. 1984).
59. In re Smith, 51 Bankr. 273 (Bankr. D.C. 1984).
60. In re Sampson, 51 Bankr. 13 (Bankr. D.C. 1984).
61. In re Burruss, 57 Bankr. 415 (Bankr. D.C. 1984).
62. In re North Duke Ltd. Partnership, 57 Bankr. 412 (Bankr. D.C. 1984).
63. In re Page Associates, 51 Bankr. 11 (Bankr. D.C. 1984).
64. In re Perkins, 51 Bankr. 272 (Bankr. D.C. 1984).
65. In re Butler, 51 Bankr. 261 (Bankr. D.C. 1984).
66. In re Washington Communications Group, Inc., 41 Bankr. 317 (Bankr. D.C. 1984).
67. In re Ricks, 40 Bankr. 507, 11 B.C.D. 1341, Bankr. L. Rep. p. 69,945 (Bankr. D.C. 1984).
68. In re Whisenton, 40 Bankr. 468 (Bankr. D.C. 1984).
69. In re Jackson, 42 Bankr. 76 (Bankr. D.C. 1984).
70. In re VVF Communications Corp., 41 Bankr. 546 (Bankr. D.C. 1984).
71. In re Hagel Partnership, Ltd., 40 Bankr. 821 (Bankr. D.C. 1984).
72. In re Kent, 40 Bankr. 467 (Bankr. D.C. 1984).

From letters to The Honorable Patricia M. Wald, Chief Judge, United States Court of Appeals for the District of Columbia Circuit:

"Judge Bason is a man of outstanding legal ability and has performed his duties as Bankruptcy Judge with distinction. He has displayed the ability to develop, in his scholarly and well written legal opinions, the rationale underlying his decisions in a manner which enhances the growing body of law with which he has been concerned.

"On the basis of my personal knowledge of Judge Bason, as well as my association with fellow attorneys who have had an opportunity to practice before him, I know he enjoys an excellent reputation among the members of the bar. Judge Bason has evidenced a sense of fairness and a knowledge of human nature which contributes immeasurably to the general belief that he possesses a high degree of judicial temperament."

--Lee W. Cowan, Esq.,
January 14, 1988

"This firm served as counsel to the Wire Service Guild in the Chapter 11 proceeding of United Press International, Inc. which was pending before Judge Bason. . . .

"We have appeared before Bankruptcy Judges in many districts and have found none of any higher caliber than Judge Bason. The UPI Bankruptcy proceedings were the most complicated, adversarial and emotional with which I have been associated. The demands upon Judge Bason's time, intellect, patience and sensitivity were incredible. . . .

"Throughout the proceedings, Judge Bason demonstrated a thoughtful, practical and informed approach to these proceedings. I know that all of the attorneys involved in the UPI proceeding shared this view of the Judge, whether he ruled in their favor or against them. Statements were made at the confirmation hearings by most counsel, to the effect that UPI could have never come through its Bankruptcy without the guidance and governance of Judge Bason. I wholeheartedly share that view."

--Daniel M. Stolz, Esq.,
Lehman & Wasserman,
January 22, 1988

"I have been acquainted with Judge Bason since approximately 1972. . . .

"[Judge Bason] is extremely well-versed in bankruptcy law, practice and procedure, and is consistently effective in dealing with the most complex legal issues.

"In addition, Judge Bason acted as Chairman of several local bankruptcy committees, of which I was a member, and demonstrated vast knowledge of bankruptcy legislation and rule-making procedures. He has prepared several bankruptcy practice manuals and form books.

"As the Bankruptcy Judge, he is patient, conscientious, highly-motivated and extremely competent. He has otherwise demonstrated exemplary legal ability and fundamental human decency. His performance in office has been commensurate with his outstanding qualifications.

"In one highly innovative and unique mechanism, . . . he has successfully resolved a nationwide problem. . . . I have discussed this innovative mechanism at national conferences with other Chapter 13 trustees, judges and practitioners . . . and, at their request, have sent [copies of Judge Bason's solution] all over the country."

--Cynthia A. Niklas, Esq.,
Chapter 13 Trustee for the District of Columbia,
Pitts, Wike & Niklas,
January 21, 1988

"In my cases before the Bankruptcy Court for the District of Columbia, I have found the Court to be fair to all parties, temperate in judgment and respectful to counsels. Although [Judge Bason's] rulings have not always favored my clients, they have always been based in law and on the Code."

--Joseph S. Friedman, Esq.,
January 21, 1988

"We have always found [Judge Bason] to provide the utmost respect and courtesy to all parties and attorneys, making certain that all parties have an opportunity to fully set forth their position. We have observed and it has been our experience that Judge Bason provides detailed findings and supporting legal reference to his rulings. In our judgment his rulings have been fair and well reasoned. Such admirable qualities, we believe, demonstrate the soundest of attributes for a judge.

--Harris S. Ammerman, Esq.
and Joseph M. Goldberg, Esq.,
Ammerman & Goldberg,
January 21, 1988

Continued

From letters to The Honorable Norma Holloway Johnson, Chair, Panel for the Selection of Bankruptcy Judge:

"I have known [George Bason] for at least ten years. I knew him as an excellent practitioner who brought real creativity to the cases that he handled. His background in academia helps to explain an intellectual bent and a willingness to approach a problem with real depth. Judge Bason has carried these skills to the bench and has often played the role of a patient teacher trying to get some difficult concepts through some unreceptive adult minds. . . . [Judge Bason] is a strong solid judge who is willing to sit late and work around the clock in order to keep his calendar current. His temperament is remarkably polite and he is a distinguished student of the bankruptcy law."

–Paul D. Pearlstein, Esq.,
Paul D. Pearlstein & Associates,
November 20, 1987

"I have always found [Judge Bason] to display that special judicial temperament which is essential [to a] bankruptcy judge. In my personal judgment, his rulings have been fair, even-handed, impartial and tempered with humility. He is certainly hard working and scholarly, and he has demonstrated a quality in his work which is to be highly commended.

–Harris S. Ammerman, Esq.,
Ammerman & Goldberg,
November 30, 1987

"Having appeared before Judge Bason on at least a hundred bankruptcy matters during the last few years, I believe I have a sufficient factual foundation on which to evaluate his ability as a jurist. My views are based not only on those cases in which I have appeared, but also from observing numerous other cases and reading many of his published opinions.

"In my view, Judge Bason possesses all of the qualities that comprise an outstanding jurist. He makes good decisions based upon precedent, sound legal reasoning, and common sense. He treats parties and counsel in his courtroom with patience, respect, and understanding. . . .

"I am also familiar with Judge Bason's reputation in the legal community. . . . Judge Bason is highly regarded. For example, at the second annual Mid-Atlantic Institute on Bankruptcy and Reorganization Practice, which I recently attended, several of the panel members, including four bankruptcy judges, discussed opinions by Judge Bason in most favorable terms. They further indicated that these opinions would be relied upon as sound precedent in the future."

–Nelson J. Kline, Esq.,
Kline & Joseph,
November 23, 1987

From Letters to George Francis Bason, Jr.:

"My colleague, Mary Dowd, and I . . . have a high regard for your performance on the bench. . . . We have appeared before many bankruptcy judges in different jurisdictions and in our opinion, you were one of the better judges in terms of substance, procedure, and temperament."

William B. Sullivan, Esq.,
Arent, Fox, Kintner, Plotkin & Kahn,
February 29, 1988

"I would like to take this opportunity to express my profound respect for you as a conscientious and fair-minded jurist."

–Kevin R. McCarthy, Esq.,
Lepon, McCarthy & Jutkowitz,
February 5, 1988

"[Your departure] is a loss to the bench and the bar."

–Lewis I. Winarsky, Esq.,
Office of the General Counsel, Washington Gas,
January 15, 1988

"I found the Bankruptcy Court [to be] humane, sagacious, and kind yet firm under your guidance. Your approach was so fair, so positive yet professional, I always felt a sense of satisfaction."

–Catharyn A. Butler-Turner, Esq.,
February 2, 1988

"For a brief period of time, I had the distinct honor of practicing with some regularity before you. . . . Judges and attorneys are too often jaded, and lose a certain perspective and empathy for the small, inefficient, and oft-time hapless citizens who make up so large a proportion of the debtors who resort to the protection of the Bankruptcy Court. The interest you took in each individual case that came before you was and remains an inspiration to me, which, in no small measure, plays a part in the way I attempt to conduct my own practice."

–Jeffrey P. Russell, Esq.,
January 7, 1988

Mr. BROOKS. Judge, I have a couple of questions. Did you attempt to get the Department of Justice to investigate the allegations of improper conduct by Department employees?

Judge BASON. I did on a number of occasions. I suppose the first way that I attempted to do that was simply by the forcefulness of my findings and conclusions which did draw media attention.

Second, in one of my orders, I made a specific invitation to the Attorney General to designate an appropriate official outside the Department of Justice to review the INSLAW-Justice Department disputes and "to give the Attorney General independent advice with respect thereto." I did that in a bench ruling on June 12, 1987. It was in a written order pursuant to that bench ruling on July 16, 1987. On July 17, 1987, I sent a letter to Attorney General Meese enclosing a copy of that order and specifically drawing his attention to the decretal paragraph of that order which contained that invitation to him. I again sent the same material to Attorney General Meese by hand delivery on February 1, 1988. Finally, I sent, by hand delivery to Attorney General Thornburgh on September 23, 1988, a letter pointing out all these prior efforts and suggesting to him that, with his excellent reputation and being a new person in the Justice Department and having the authority, that he might wish to clean house.

I received no response ever from Attorney General Meese. The only response to my September 23, 1988, letter to Attorney General Thornburgh was a three-sentence letter from Assistant Attorney General John Bolton which amounted to a brush-off.

Mr. BROOKS. Judge, on what basis did you determine in your findings that the testimony of Department officials in the court was either totally unbelievable or biased, or both?

Judge BASON. Let me answer that question at two levels, first the factual, having to do with the factual basis. I made very detailed findings of fact and conclusions of law because of the importance of the case and because of the likelihood that it would be appealed, and so Finding of Fact No. 398 gives a general description of my findings with reference to the credibility of a number of Justice Department employees (*Inslaw, Inc.* v. *United States,* vol. 83, West's Bankruptcy Reporter, p. 89, at p. 156). And, if I may, I would read very brief excerpts.

"During the trial of this matter, the court observed the witnesses very closely and reached certain definite and firm convictions based on the demeanor and expressions of those witnesses, as well as on an analysis of the inherent probability or improbability of their testimony in light of the documentary evidence and other known facts." And then I went on and referred to, among others, the following Justice Department witnesses.

Lawrence McWhorter was Deputy Director of the Executive Office for U.S. Attorneys.

"The testimony of Lawrence McWhorter was totally unbelievable for a number of reasons. First, McWhorter could not remember anything other than a 30-second telephone call that he had with Hamilton before the contract was entered into. On cross-examination, it was brought out that he had testified at his deposition that he repeatedly could not recall virtually anything related to the contractual relationship between the parties, notwithstanding that he

supposedly had supervisory responsibility over this relationship.... Second, McWhorter's testimony was contradicted by Hamilton and also by his [own] supervisor, William Tyson. Third, Brewer was a member of McWhorter's wedding party and had advanced money to McWhorter in the form of buying into a real estate partnership with McWhorter."

Now, in addition to that, which is found at Finding of Fact No. 398, there is also Finding of Fact No. 128, footnote 13, in which I point out that, "McWhorter never asserted having this conversation at any time prior to this litigation, notwithstanding his prior meetings with Hamilton in which Hamilton complained about Brewer's bias."

Then the next witness that is referred to in Finding of Fact No. 398 is Jack Rugh, who was deputy project manager of the PROMIS implementation contract that is the subject of this dispute. "The testimony of Jack Rugh also was not believable. Rugh was a biased witness whose testimony was tainted by the negative effect Mr. Brewer and his lack of impartiality had upon Mr. Rugh. Mr. Rugh also was biased in view of his ambitions to carry on the PROMIS project in-house. Moreover, his testimony is at odds with the written PROMIS contract in several important particulars." And then I go on to describe some of those particulars. Finally, "Rugh suffered from the collective amnesia that many of DOJ's witnesses were suffering from, and this is further evidence of his unreliability."

The most telling thing to me, however, concerning Jack Rugh, I mentioned in my bench ruling in June 1987: He tried to explain away an absolutely devastating-to-DOJ's position contemporaneous handwritten memorandum by Mr. Videnieks by saying that he didn't receive the information about INSLAW being thrown into a chapter 7 liquidation proceeding from the U.S. trustees, as Mr. Videnieks' memorandum indicated, but instead he remembered there was some other case involving some other company 6 or 7 years ago in the Midwest and that company had filed for chapter 11 relief and 60 days later they were in chapter 7 bankruptcy, and that contrary to all the written documentation, it was this long dormant, out-of-date recollection that caused him to believe INSLAW was going to be converted to chapter 7. And I, I think in my bench remarks, I said something to the effect, "How could I believe a cockamamie story like that?"

So that his having told me something that was so demonstrably unbelievable on the witness stand thereafter tainted his credibility as a witness in my view, and everything that he said subsequent to that did nothing to rehabilitate him and, indeed, further tainted his credibility.

Now the next one that is mentioned in Finding of Fact No. 398 is William Tyson. He was the director of the Executive Office for U.S. Attorneys. "His testimony that Brewer's attitude toward INSLAW was positive, constructive, and favorable is so ludicrous in light of the evidence taken as a whole that it was difficult for this court to believe any of Mr. Tyson's testimony. Tyson displayed an extraordinarily blase attitude toward serious allegations of personal bias by Brewer toward Hamilton and INSLAW and did little, if anything,

to discharge his responsibilities as Brewer's superior to investigate these allegations."

Now the next one that is mentioned in this Finding of Fact is C. Madison Brewer himself, and I make a very brief, one-sentence statement at that point: "The testimony of C. Madison Brewer was most unreliable, and entirely colored by his intense bias and prejudice against Hamilton and INSLAW." That is elaborated upon rather extensively in Findings of Fact 105, 106, 107, 108, 109, 110, and 125, and if you would like me to quote from those, I will. If you would prefer me to go on with the next one, I will. But there was just no question in my mind, and, of course, Chief—Senior District Judge Bryant upheld me in this view.

Mr. BROOKS. Did it turn up in the evidence that he had been a former employee who was canned by Hamilton and INSLAW?

Judge BASON. Absolutely. That was my finding of fact, that he was a former employee of INSLAW who had been fired by Bill Hamilton. Brewer himself testified that there came a time while he was employed at INSLAW that he was "no longer a part of Hamilton's 'select circle,' and was no longer included in meetings of any import." He felt that he had become a "nonperson." (Finding of Fact 105.)

During his employment, "he developed very negative opinions about Hamilton." (Finding of Fact 106.) This is entirely apart from the question whether he was fired by INSLAW's predecessor.

He testified on the witness stand that he thought Hamilton was "crazy;" he [Hamilton] was "a very troubled individual;" he considered Hamilton was an "M.O.," meaning an individual sent away for mental observation because of bizarre behavior. He characterized Hamilton as "crazy Bill." (Finding of Fact 107.) He said that INSLAW's empirical research was "kind of a joke." (Finding of Fact 108.)

These were his opinions that he developed during the period of time of his employment with INSLAW's predecessor. He repeated these negative comments to others subsequently. (Finding of Fact 109.)

And that is why I concluded, in Finding of Fact No. 110, "On the basis of the foregoing and the evidence taken as a whole, this court is convinced beyond any doubt that, prior to assuming his position as the PROMIS project director at Executive Office for U.S. Attorneys, and during the course of discharging his responsibilities in that position, Mr. Brewer was consumed by hatred for and an intense desire for revenge against Mr. Hamilton and INSLAW, and acted throughout this matter in a thoroughly biased and unfairly prejudicial manner toward INSLAW."

And then the next—going back to Finding of Fact 398, the next was the contracting officer, Peter Videnieks, and I found that Videnieks was under Brewer's domination and was thoroughly affected by Brewer's bias. In addition, Videnieks displayed an amazing lack of recognition—recollection of pertinent facts, especially in regard to the very detailed notes which he maintained in respect to this matter. It is obvious that he "acted at the bidding of Brewer and that his attitude toward INSLAW was directly the consequence of Brewer's influence on him." And I also refer to him in Findings of Fact 133 and 137, and I point out there that his "testi-

mony, especially at deposition but also in court, reveals a man keenly aware of his own limitations and the superior rank and knowledge possessed by Brewer and Rugh." He was a lower level employee who was dependent on the expertise of others, specifically Brewer and Rugh, in all areas about which he had to make decisions as the contracting officer, and he was dependent upon their goodwill for his professional livelihood and advancement. (Finding of Fact 133.)

And in Finding of Fact 137: "Both Rugh and Videnieks were infected by Brewer's poisonous attitude toward Hamilton and INSLAW, and they aided and assisted Brewer in his wrongful efforts to injure INSLAW. Rugh also was improperly motivated by his desire to build a small empire within [the Executive Office] if DOJ were to take over the job of software development. . . ."

The next person after Videnieks is Janis Sposato, and in Finding 398 I simply stated with respect to her that her testimony—she was the general counsel of the Justice Management Division of the Justice Department, and I stated, "Given [her] position as a DOJ ethics officer, her casual treatment of repeated serious allegations of outrageous misconduct by Brewer can only be described, even charitably, as willful blindness to the obvious."

Mr. BROOKS. "Willful blindness to the obvious." It's kind of a nice line, Judge.

Judge BASON. Well, I thought it was at the time that I dreamed it up. I don't think I borrowed that from anybody. Sometimes you can unconsciously borrow a phrase from some previous speaker.

Mr. BROOKS. One of the privileged documents we are trying to get from the Department is a memorandum from this Janis Sposato to Peter Videnieks, and that would be interesting to see.

Judge BASON. I would think so.

Mr. BROOKS. Judge, why do you think Judge Blackshear recanted his original sworn statement regarding the Department's pressure to liquidate INSLAW's assets?

Judge BASON. Originally, in my bench ruling on June 12, 1987, I stated the belief I then held that his recantation was "the result of an honest mistake on his part." However, because of new information that has come to my attention since I left the bench, I have now, regretfully, concluded that Judge Blackshear recanted not because of an honest mistake but because he made a conscious choice to testify falsely.

The new information includes data revealed in a staff study by the Senate Permanent Subcommittee on Investigations and also in an article by an investigative reporter for Barron's. The staff study "concluded that Blackshear's explanation as to why he recanted was inconsistent with facts uncovered in this investigation. On four separate occasions, including a conversation with another judge . . . and a sworn deposition, Blackshear told a story totally consistent with" the other credible evidence, what I have found to be the other credible evidence; and the staff study concluded that they "found Blackshear's explanation of the reasons for his recantation to be implausible. Blackshear told the same story four times—a very fact-specific story which, unbeknownst to Blackshear, was entirely consistent with the testimony of [his former colleague] Pasciuto. It was only after talking with [former colleague]

White, who had testified previously in an inconsistent manner (again unknown to Blackshear) that Blackshear then [recanted]. . . . Furthermore, some of the statements Blackshear made in his recantation are inconsistent with the facts. . . ." And then the staff study goes on and simply details those facts. (P.S.I. Staff Study, pp. 42–43 et seq.)

And, finally, in the Barron's article there is a direct quotation of the conversation that Blackshear had with Pasciuto some time after these various events, in which Blackshear is quoted as saying, "These people came up from Washington and the U.S. Attorney's Office; I got confused. I thought that by changing my story I would hurt less people. . . . They sent someone from Washington and someone from the U.S. Attorney's Office. I felt the easiest thing to do was recant. I felt less people would be hurt if I just bailed out." And then the Barron's reporter interviewed Blackshear directly, and to her he said, "I don't remember the specifics, word for word, but I do remember having that conversation, and I don't have any problems with what Tony [Pasciuto] remembers." (Barron's, Mar. 21, 1988, pp. 18 and 58.)

I do not see how anyone could get closer to confessing that he has perjured himself in order to hurt less people than, unfortunately, Judge Blackshear did in this case.

Mr. BROOKS. Judge, do you agree with Bill Hamilton that a criminal conspiracy existed within the Department to injure INSLAW?

Judge BASON. Mr. Chairman, of course what was before me was a civil case in which the burden of proof was not as demanding on the plaintiff as would be so in a criminal prosecution, but after hearing the evidence and observing the witnesses and reading the written material that came before me as a judge, I regret to say that I became convinced beyond any doubt that within the Department of Justice a criminal conspiracy existed to convert or steal INSLAW's property and to drive INSLAW out of business, and beyond that, when the matter came before me as the presiding trial judge, a conspiracy to obstruct justice by giving false testimony.

Mr. BROOKS. Are you aware of any other bankruptcy judge who sought reappointment and was denied and, after a second review, was reappointed?

Judge BASON. Yes. Chief Judge Harold Lavien of the U.S. Bankruptcy Court in Massachusetts had that experience. Unlike me, Judge Lavien received notice of the adverse decision by the Merit Selection Panel prior to the time of the Court of Appeals' final decision regarding him. Unlike me, he received notice of the allegations against him that led to that adverse decision by the panel. Unlike me, he was granted an opportunity to appear, and he did appear, before the Judicial Council of the First Circuit in order to answer the allegations and present his side of the matter, and, as a result, unlike me, he was reappointed by his Court of Appeals.

Mr. BROOKS. Mr. Fish, the gentleman from New York.

Mr. FISH. Thank you, Mr. Chairman.

Mr. Chairman, Judge Bason, on page 2 of his testimony—and I quote—states the following: "However in this case several circumstances indicate that the decision of the Merit Selection Panel

must have been the result of some improper interference with its processes." For the record, I think it is important to note that the document entitled "Staff Study of Allegations Pertaining to the Department of Justice's Handling of a Contract With INSLAW, Inc."—the product of the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, U.S. Senate—dated September 1989, includes under the heading, "Summary of Staff Investigation," Summary H on page 36 which reads: "The staff found no proof that the Department of Justice attempted to influence the selection process for U.S. Bankruptcy Court judge in order to deny Judge George Bason reappointment," and I would just like to read two sections on page 37 of that report.

The first says, "Applications are reviewed by a Merit Selection Panel whose members are appointed by the Chief Judge of the Circuit upon the recommendation of the Chief Judge of the District." Second, "The Staff reviewed the official files pertaining to the selection process and interviewed Judges Patricia Wald and Abner Mikva of the Court of Appeals and Judges Aubrey Robinson and Norma Holloway Johnson of the District Court, all of whom participated at various stages in the selection process. The Staff found no proof that the Department of Justice attempted to influence the selection process so as to deny Judge Bason reappointment. The judges all stated to the Staff that they had never been contacted by anyone in the Department of Justice with complaints about Judge Bason vis-a-vis INSLAW."

Thank you.

Mr. BROOKS. Mr. Edwards, the gentleman from California.

Mr. EDWARDS. Thank you, Mr. Chairman.

Judge, your experience reinforces my view that it was a good move in the House of Representatives some years ago when we passed through this committee and voted in the House of Representatives that bankruptcy judges should be article III judges. Unfortunately, that important portion of the bill was removed in the conference with the Senate. But, we had done work for a number of years in studying and having hearings on bankruptcy in general. The subcommittee I chaired came to the conclusion that the independence of the bankruptcy court, with article III judges, would have been in the best interests of justice. Thank you for your testimony.

I yield back my time, Mr. Chairman.

Mr. BROOKS. Thank you, Mr. Edwards.

Mr. Campbell, the gentleman from California.

Mr. CAMPBELL. Thank you, Mr. Chairman.

Following up, if I may, the comments of my colleague from New York, Judge Bason, how, in your judgment, how, in your belief, did the Department of Justice effectuate your failure to be reappointed if the process is done by the judges and if they testified they were not contacted?

Judge BASON. I can only conclude that it was done in the—along the lines that was stated to me by the reporter who contacted me, and that would have been, of course, that it was not done through an official appearance before the Merit Selection Panel but, rather, that it was done in off-the-record conversations in a manner that would not be subject to being detected, or at least certainly that it

was hoped that it would not be subject to being detected, and, frankly, I certainly have less resources than most of the other people in this room for investigating anything, so that, beyond what I've said, I don't have knowledge as to how it might have been done. But we do have a dead body, and we do have a strong motive, and so I have drawn inferences based on the knowledge that I do have.

Mr. CAMPBELL. Thank you, Judge.

Thank you, Mr. Chairman.

Mr. BROOKS. I want to thank you very much, Judge, and, of course, it's a personal blow to yourself, being the dead body in that case, but the main thrust is your judgment as a sitting bankruptcy judge that the evidence showed, as you held, that the Justice Department stole INSLAW's valuable property and tried to drive INSLAW out of business; that's the real point, and that's what you are here to testify about. We're grateful to you for being here.

Judge BASON. That's correct. Thank you, Mr. Chairman and members of the subcommittee.

Mr. BROOKS. Before we proceed to the testimony of Mr. Ross and his able deputy, Charles Tiefer, and Associate Counsel Mick Long, I believe it would be useful to summarize the history surrounding our access problems with the Justice Department on the INSLAW investigation.

In August 1989, I notified the Attorney General I had initiated an investigation of ADP management practices at the Department, including a thorough review of the INSLAW controversy. I had hoped that, given the seriousness of the charges against the Department, Justice officials would cooperate fully with the committee. But after several months of stonewalling and foot dragging by the Department, I was forced to ask the Attorney General to personally intervene to ensure the Department provided our investigators with full and unrestricted access.

In May 1990, the Attorney General informed me that, as a result of my request, he had directed Justice officials to cooperate fully with the committee investigation. Arrangements were subsequently made for the subcommittee's access to Department files, which worked rather smoothly. Committee investigators interviewed numerous current and former Justice Department officials and reviewed reams of documentation provided by the Department.

While there was some delay and obfuscation in meeting our requests, for the most part Justice officials cooperated with our work; that is, until September, and suddenly this spirit of cooperation vanished. In its place, new claims of privilege and confidentiality appeared.

The conflict appears to center on a class of documents related to something called litigation strategy files, or, simply, litigation files. Apparently, these files contain documents which were collected and stored by the Department to assist in its litigation of the INSLAW case.

In September 1990, I wrote Attorney General Thornburgh and again asked for full and open access. The Attorney General responded that his earlier agreement to fully cooperate with the committee did not include a commitment to release sensitive documents related to the ongoing litigation of the INSLAW case. This

included all documents and records collected and used at the Bankruptcy Court and the Federal District Court, even though decisions have already been rendered by both of those courts. Apparently, the Department is asserting that all these materials—more than 200 documents—are privileged and therefore shielded from congressional access and scrutiny.

As a result of the Attorney General's decision to deny the committee's access to those documents, a committee investigation of the INSLAW allegations cannot be completed, and I have asked the House counsel, Mr. Steve Ross, to testify today to help us review the legitimacy of the Attorney General's claims and determine whether the committee should force the production of these important records.

As I mentioned earlier, the next panel is comprised of Steven R. Ross, general counsel to the Clerk of the House; Charles Tiefer, the deputy general counsel; and Mick Long, assistant counsel. These gentlemen are well versed in constitutional law. They have got broad experience in litigating cases involving congressional access to executive branch documents, records, and personnel. They are highly respected, as they should be, by both sides of the aisle, and we are fortunate to have them assisting us today.

I want to thank you for taking the time to be over here this morning, gentlemen. Your joint statement will be made a part of the hearing, and, Counselor, you might proceed with any statement you would like to make, and your statement is already, in detail, in the record, every pristine word.

STATEMENT OF STEVEN R. ROSS, GENERAL COUNSEL TO THE CLERK, U.S. HOUSE OF REPRESENTATIVES, ACCOMPANIED BY CHARLES TIEFER, DEPUTY GENERAL COUNSEL, AND R. MICHAEL LONG, ASSISTANT COUNSEL

Mr. Ross. Thank you, Mr. Chairman. It is an honor and a privilege to appear before the distinguished chairman and this distinguished panel on the question of the Attorney General's claim of privilege which would excuse him from providing documents to this committee in its important work.

Mr. Chairman, we have been asked today to analyze the Attorney General's decision to withhold those documents from this committee. Specifically, the Attorney General has written the committee that he is withholding several hundred documents, citing as his main assertion that the pendency of civil litigation reveals the Department from its obligation to provide documents called for by this committee even if those documents may reveal governmental waste, fraud, or abuse.

On September 26, 1990, the Attorney General responded to a committee demand for documents with a statement that, "My pledge to cooperate fully in the committee's investigation, however, should not be construed in any way that would be inconsistent with my responsibilities as the Attorney General, the Nation's chief litigator. Those responsibilities include the obligation to protect documents compiled by attorneys in connection with pending litigation which are not in the public domain and could be described as litigation strategy or work product."

Mr. BROOKS. That could be described as coverup, or hiding, or holding out.

Mr. ROSS. The Attorney General's position in that letter is somewhat surprising, given his earlier remarks and communications with the committee, and I make specific reference to the Attorney General's letter of August 21 in which, on page 2, he specifically invited the committee—and I'll use his words—"that I urge you to review some of the available information about INSLAW and its allegations before committing the resources of the committee to a full-fledged investigation based upon unsubstantiated innuendoes."

On the one hand, the Attorney General was inviting the committee to review the documents, and then, when the committee asked to see those very same documents, he has switched positions and now is saying that those documents are privileged from the committee's purview.

The Attorney General's claimed basis for this withholding of documents is an attempt to create for himself and his functionaries within the Department an exemption from the constitutional principle that all executive officials, no matter how high or low, exercise their authority pursuant to law and that all such public officials are accountable to legislative oversight aimed at ferreting out waste, fraud, and abuse.

If I might remark at this point, in the letter received today from the Attorney General, from the Attorney General's office, (see app. 1, p. 163) that the Department of Justice tries to create a new standard for what is an acceptable means of committee investigation, and that is on page 2 in the last full paragraph. He says that the congressional investigations are justifiable only as a means of facilitating the task of passing legislation. What that proposed standard would do would be to eradicate the time-honored role of Congress of providing oversight, which is a means that has been upheld by the Supreme Court on a number of occasions, by which the Congress can assure itself that previously passed laws are being properly implemented.

That standard is also somewhat constrained in the proper role of Congress because it neglects to take into account the role of Congress in both authorizing the continuation of entities such as the Department of Justice and the appropriation to be provided for their continued operation. It is an overly constrained reading of Congress' investigatory authority.

Mr. BROOKS. Would the counsel yield just a moment to my friend, Mr. Fish?

Mr. ROSS. Most certainly.

Mr. FISH. Mr. Ross, I intend to go into some detail with you when the opportunity arises as to the thrust of this argument, but I want to concede at this point that the sentence that you picked out from this 2½ page letter from the Department of Justice is, in my judgment, also not a technically correct statement of the power of the Congress in this regard, but I think the rest of it stands if you just omit that sentence which is far too narrow.

Mr. ROSS. Well, if I might say, the Department of Justice does not go out of its way to take slaps at committees of Congress. The reason they put language that is so egregiously wrong in the letter is that that language provides the fulcrum on which their entire

theory rests. That is how they get to the end that the committee cannot have access to these records. It is only by excluding this committee's oversight function and thus wiping out the Supreme Court law of *McGrain* v. *Daugherty* and many other instances in which this committee and the Congress in general has provided oversight of the Department's function as the Nation's litigator that they are able to preclude this committee from having access to records necessary to perform such oversight.

Our written testimony takes a two-step approach. First, we discuss the history of congressional oversight of the Department of Justice and the Supreme Court cases and other cases describing the reach of that authority; and then, second, we engage in a discussion of the doctrinal aspects of the Attorney General's claim. If I might just briefly review that history, and we started with what is known as the Teapot Dome scandal, a scandal regarding oil company payoffs during the Harding administration, and particularly to the case of *McGrain* v. *Daugherty* that I've mentioned in which the Supreme Court focused specifically on Congress' authority to study "charges of misfeasance and nonfeasance in the Department of Justice."

In that case, the Supreme Court noted with approval that the subject to be investigated by the congressional committee was the administration of the Department of Justice, whether its functions were being properly discharged or being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes. In its decision, the Supreme Court sustained the contempt arrest of the Attorney General's brother for withholding information from Congress, since Congress "would be materially aided by the information which the investigation was calculated to elicit."

Thus, the Supreme Court itself has declared null any attempt at pretensions that oversight could be barred regarding "whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings."

A second case during the Teapot Dome era to reach the Supreme Court was *Sinclair* v. *United States,* a case with particular application to the current controversy pending before the committee. In the *Sinclair* case, a witness had testified before the committee that it would reserve any evidence that he might be able to give the courts and shall therefore respectfully decline to answer any questions propounded by the committee. The Supreme Court upheld the witness' conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness' contention that the pendency of lawsuits gave an excuse for withholding information. Neither the laws directing that such lawsuits be instituted nor the lawsuits themselves operated to divest, in that case, the Senate or the committee of power further to investigate the actual administration of, in that case, the land laws.

Bringing us more to the modern era, I return to the events surrounding Watergate and the congressional investigations of that matter, the matter that the chairman and this committee are all too painfully familiar with. One aspect of the Watergate inquiry by

this committee was the committee's investigation and conclusion regarding the attempted stonewalling by the administration of the original congressional investigation into the Watergate break-in, and that became a part of this committee's impeachment report. That report described "the President"—that the President continued to stress the importance of cutting off the Patman hearings, which John Dean said was a forum over which they would have the least control, and that Dean accordingly took steps to implement the President's decision to stop the Patman hearings, that he interfered with the Department's response to the Patman committee, and that the—in reviewing those facts, the report concluded—the impeachment report concluded—that, unknown to Congress, the efforts of the President, through John Dean, his counsel, specifically having the assistant attorney general tell Congress to hold off its investigation because of pending legal proceedings, had effectively cut off the investigation.

The next historical matter that we turned to was the EPA or Ann Gorsuch Burford investigation, another matter which this committee was familiar with. It is that investigation and the Congress's actions in that investigation that perhaps give one of the better guides to the interaction between a claim that documents may be enforcement or litigation sensitive and Congress's continuing ability to obtain access to those documents.

After the documents had eventually been turned over to the committees of substantive jurisdiction, Public Works and Energy and Commerce, this committee conducted an inquiry into the Department of Justice's role in the claim of privilege, declining to turn over those documents. The Judiciary Committee eventually investigated that and issued its report, the Report of the Committee on the Judiciary on Investigation of the Role of the Department of Justice in Withholding EPA Documents from Congress in 1982 and 1983.

The description that was given to the basis for withholding those documents is strikingly similar to the description given by the Attorney General with respect to these documents, and let me quote for a moment the description that the then Attorney General's Office gave: "The only documents which have been withheld are those documents which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, list of potential witnesses, settlement considerations, and similar materials, the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals."

If I might take a moment at this point, it is interesting to note that in the EPA matter at some point the Department and the administration realized that the claim of enforcement sensitive with respect to the documents was not a sufficient barrier to congressional access, and they proceeded to what they perceived to be the next step, which was to try to base their refusal to provide the Congress with information on doctrines of separations of powers, and in that instance the President himself interposed a claim of executive privilege, a claim that the committees reviewed and the President eventually withdrew and provided the documents.

But in that instance, it was clear that merely labeling documents as enforcement sensitive and trying to borrow, if you would, from either the litigation arena or the FOIA arena claims of why documents cannot be made public or turned over to an adversary have no place in the interaction and the by-play between the branches of government, that if the executive branch wants to claim that it has a constitutional basis for withholding documents from the Congress, the proper way to do that is to phrase it as a separation of powers claim and let the President come forward and make a claim of executive privilege which the Congress can then review, but to try to impose the standards of either discovery in litigation or FOIA is misplacing the constitutional roles of the branches. That that was so was readily apparent in the litigation that developed out of the EPA matter.

As I said, the Department and the President eventually withdrew the claim of enforcement sensitive and executive privilege. It only did so after the District Court for the District of Columbia rejected the attempt by the Department of Justice to interfere in the investigatory process of the Congress by filing a suit seeking to enjoin the Congress from going forward with its investigatory process, a suit that was thrown out in just a matter of days by the District Court for the District of Columbia, after which the President capitulated, withdrew the claim of executive privilege, and provided the documents to the relevant committees of the Congress.

The most recent historical example that we have cited is that involving the Iran-Contra investigations in which the committees demanded the production from the Justice Department's files of certain documents and the Department of Justice responded—it was Assistant Attorney General Bolton on behalf of Attorney General Meese—that withholding the documents was justified because providing them would prejudice the pending or anticipated litigation that might be brought by the independent counsel. The Iran-Contra committees overruled that claim of enforcement sensitive privilege and required the Justice Department to provide the documents, and they were provided.

It is thus clear that, in light of the history of claims by the Department that it may be excused from providing the Congress in general and this committee in particular with documents that it deems litigation sensitive, that Congress' broad power of investigation overcomes those litigative concerns.

If I might turn then to the specific doctrines claimed by the Attorney General to support this withholding, if I might discuss that in terms of the Attorney General in Lee Rawls' letter dated today, it has made it clear that their bottom line position is that they fear that turning the documents over to the committee would constitute a waiver of potential claim of privilege that they might have in the litigation.

If I might quote Rawls' letter: "Providing the committee with documents which are not discoverable in the ongoing civil litigation, and certainly the public use of that material by the committee, could be construed as a waiver of our litigation privileges," and it seems to me that their main fear is that—at least their main fear that they are willing to put on paper—is a fear that they might waive some privilege that they might have or some advan-

tage in an adversarial sense that they might have vis-a-vis their opponents in specific litigation. Those claims have been specifically addressed by courts in earlier contexts.

In the *Sinclair* case that I discussed earlier arising in the Teapot Dome scandal, the Court held: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding in the prosecution of pending suits, but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."

Thus, it is clear that the Supreme Court has held that the fact that the committee's work may parallel an issue that is involved in litigation does not deprive this committee of its constitutional basis to continue to operate and that it can continue to operate in that fashion.

With respect to the claim that fear of waiver—that is a matter that has been discussed specifically in this district in the case, *Murphy* v. *Department of Army,* and let me quote from the opinion of the Circuit Court in that with respect to the doctrine of waiver: "It is evident that the disclosure to Congress could not have had that consequence," the consequence of a waiver. "Congress has long carved itself a special right of access to privileged information not shared by others. If every disclosure to Congress would be tantamount to a waiver of all privileges and exemptions"—in that case talking about exemptions from FOIA—"executive agents would inevitably become more cautious in furnishing sensitive information to the legislative branch, a development at odds with public policy which encourages broad congressional access to governmental information."

The cases that we have cited discussing and describing the broad range of Congress' investigatory power—Eastland, Barenblatt, and Watkins—make it clear that the committee has the authority to inquire into all areas of administration or maladministration of existing laws, has the power to inquire whether appropriated funds are being handled or being utilized by the executive branch in an appropriate way, whether changes in existing laws should be contemplated or made, and it is as broad and far-reaching as the power of the Congress to enact laws, including appropriations and authorizations of Departments under the Constitution.

It is interesting, in terms of talking about this committee and the Congress's role of appropriating and authorizing Departments, to remember that it is—this committee and this Congress is part of the Government that the attorneys that were working on these matters is intended to serve, and it is a valid question for the Congress to ask whether the direction of the Government should be changed.

It is up to the Congress to set national policy, and one means in which the Congress sets national policy and dictates changes in national policy is to review how current laws are being implemented, and, clearly, those types of reviews are within the realm of congressional investigations deemed appropriate by the Supreme Court in cases such as *Eastland, Watkins,* and *Barenblatt.*

I will answer other questions that the committee might have, but we will rely on our written testimony to cover the other ground.

[Mr. Ross' prepared statement follows:]

STATEMENT BY GENERAL COUNSEL TO THE CLERK
OF THE HOUSE OF REPRESENTATIVES
REGARDING THE ATTORNEY GENERAL'S WITHHOLDING
OF DOCUMENTS FROM THE JUDICIARY COMMITTEE

Mr. Chairman, we have been asked to analyze the Attorney General's decision to withhold documents relating to the INSLAW matter from this Committee. Specifically, the Attorney General has written the Committee that he is withholding several hundred documents, citing as his main assertion that the pendency of civil litigation relieves the Department from its obligation to provide documents called for by this Committee, even if those documents may reveal governmental waste, fraud, or abuse. On September 26, 1990, Attorney General Thornburgh responded to a committee demand for documents with this statement:

> [My "pledge to cooperate fully in the Committee's investigation"], however, should not be construed in any way that would be inconsistent with my responsibilities as the Attorney General, the nation's chief litigator. Those responsibilities include the obligation to protect documents compiled by attorneys in connection with pending litigation, which are not in the public domain and could be described as "litigation strategy" or "work product.

The Attorney General's claimed basis for withholding of key documents represents an attempt by him to create an exception for himself and functionaries within his Department to the constitutional principle that all executive officials, high or low, exercise their authority pursuant to law and that all such public officials are accountable to legislative oversight aimed at ferreting out waste, fraud, and abuse. Although cloaked in doctrinal terms, the Attorney General's assertion of immunity from oversight represents an attempt to free the Justice Department from the time-honored system of checks and balances.

We have analyzed the Attorney General's position in two steps. First, we review the history of precedents regarding oversight of the Justice Department. These show the Attorney General is obliged to submit to oversight, regardless of whether litigation is pending, so that Congress is not delayed for years in investigating misfeasance and/or malfeasance in the Justice Department and elsewhere. Second, we review the particular doctrines put forward by the Attorney General as they bear on these documents, and conclude that the asserted reasons for withholding these documents from the Committee are without merit.

I. THE PRECEDENTS SHOW THE ATTORNEY GENERAL IS OBLIGED TO SUBMIT TO OVERSIGHT, REGARDLESS OF WHETHER LITIGATION IS PENDING

The precedents regarding oversight of the Justice Department, and particularly oversight of actions by the Attorney General, include a number of important Congressional investigations, such as Teapot Dome, Watergate, the Anne Gorsuch/EPA investigation of the early 1980s, and Iran-contra. While the Inslaw matter has not yet attained the notoriety that these Justice Department scandals came to have, it raises again the basic question of fraud or abuse within the Justice Department, and a Congressional investigation in which the Attorney General resists oversight in a way that may conceal fraud or abuse within the Department. Our review of these precedents shows that when the Congress is investigating waste, fraud, and abuse, as it is in the INSLAW matter, the Attorney General has been obliged to submit to oversight, regardless of whether litigation is pending.

Teapot Dome

During Teapot Dome -- the 1920s scandal regarding oil company payoffs to the Harding Administration -- Attorney General Daugherty's failures to prosecute became a major concern of the Congressional oversight investigation.[1] When Congressional committees attempting to investigate came up against refusals to provide information, the issue went to the Supreme Court and provided the Court with the opportunity to issue one of its classic decisions describing the constitutional basis and reach of congressional oversight. In McGrain v. Daugherty, 273 U.S. 135, 151 (1927), the Supreme Court focused specifically on Congress's authority to study "charges of misfeasance and nonfeasance in the Department of Justice." The Supreme Court noted with approval that "the subject to be investigated" by the Congressional committee "was the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes. . . ." Id. at 177. In its decision, the Supreme Court sustained the contempt arrest of the Attorney General's brother for withholding information from Congress, since Congress "would be materially aided by the information which the investigation was calculated to elicit." Id. Thus, the Supreme Court itself has

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[1] Diner, Hasia, "Teapot Dome, 1924," in Congress Investigates: 1792-1974, 199, 211 (A. Schlesinger & R. Bruns eds. 1975).

declared null any attempted pretensions that oversight could be barred regarding "whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings." Claims by the Attorney General that he can block such oversight simply attempt to assert prerogatives of being above the law which have been rejected by the Supreme Court.

In another Teapot Dome case that reached the Supreme Court, Sinclair v. United States, 279 U.S. 263 (1929), a different witness at the Congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts. . . and shall respectfully decline to answer any questions propounded by your committee." Id. at 290. The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits gave an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws." Id. at 295.

The Court further explained: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent

disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." Id. at 295. In other words, those having evidence in their possession -- like the Attorney General -- cannot lawfully assert that because civil lawsuits are pending involving the government, "the authority of [the Congress], directly or through its committees, to require pertinent disclosures" is somehow "abridged." On the contrary, the Supreme Court vindicates Congress's authority to obtain such information, and denounces those who would withhold the information on the asserted ground of pending civil proceedings, even to the point of upholding the conviction and sentencing of those who attempt such withholding.

An appropriate note to the Teapot Dome period is that despite the attempts at withholding, the Congressional investigations uncovered sufficient evidence of "illegality, graft, and influence-peddling in the Justice Department"[2] for Attorney General Daugherty to resign.

Watergate

With the events of Watergate, we enter a period of history with which the current Chairman, and a number of members of the

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[2] In 1920 and 1921, two committees investigated the notorious Palmer raids in which, under the direction of the Attorney General, hundreds of persons were illegally arrested, detained and deported. The committees explored at length the specific abuses by the Department -- not closed matters, not statistical analysis, but concrete current abuses. Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others: Hearings Before the House Comm. on Rules, 66th Cong., 2d Sess. (1920); Charges of Illegal Practices of the Department of Justice: Hearings before a Subcomm. of the Sen. Comm. on the Judiciary, 66th Cong., 3d Sess. (1921).

Committee, are familiar, and in which they played a significant part. As the Committee will recall, after the Watergate break-in and during the initial trial of the Watergate burglars, the House Banking and Currency Committee, chaired by Congressman Wright Patman, sought to conduct its own investigation. However, the White House under President Nixon used the pendency of the burglary prosecution as an excuse to block the Congressional investigation, which subsequently became part of the case for impeachment. The Judiciary Committee's subsequent Impeachment Report investigated and reached firm conclusions regarding this attempted stonewalling of a Congressional investigation.

As this Committee's Impeachment Report describes, in late 1972, "The President continued to stress the importance of cutting off the Patman hearings, which [John] Dean said was a forum over which they would have the least control." Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 1305, 93d Cong., 2d Sess. 63 (1974). Accordingly, "Dean took the necessary steps to implement the President's decision to stop the Patman hearings. [ ]. He contacted Assistant Attorney General Henry Petersen and urged Peterson to respond. . . . Petersen wrote to Chairman Patman and stated that the proposed hearings could prejudice the rights of the seven Watergate defendants. . . ." Id. at 65. The Impeachment Report concluded, "Unknown to the Congress, the efforts of the President, through Dean, his counsel" -- specifically, having the Assistant Attorney General tell Congress to hold off its investigation because of pending proceedings -- "had effectively cut off the investigation." Id.

Of course, the excuse of pending proceedings did not keep Congress out of investigating Watergate forever; it only delayed that Congressional investigation. By Spring of 1973, Congressional committees were no longer accepting the claim of parallel proceedings as an excuse for withholding evidence. Ultimately, Watergate and its cover-up, including the role of Attorney General Mitchell, the role of Attorney General Kleindienst in related matters, and the manipulation of the Justice Department and the FBI, were thoroughly probed by the Senate Watergate Committee and the House Judiciary Committee. This probing occurred at the same time as the pending investigations and proceedings of Special Prosecutors Cox and Jaworski. The Impeachment Report reflects the detailed investigation, not just of the use of the Justice Department to obstruct the Patman Committee inquiry, but of numerous other Justice Department activities, from Attorney General Kliendienst's role in the ITT case and Attorney General Mitchell's lying to a Congressional committee to the misuse of the FBI. Id. at 174-76 (Kleindienst), 152-56 (FBI).

Watergate was a dramatic instance where the House and Senate investigations had to overcome, not mere claims of pendency of civil proceedings -- let alone, as here, mere pendency of the appeal from such proceedings -- but claims of impact on soon-to-be-tried criminal cases. It was up to the committees to determine what evidence they needed, not to the Justice Department to measure whether to block those committees. History reflects that it was only because this Committee insisted on obtaining all the documents and other evidence from the Justice Department, despite any claims

about pending proceedings, that the depths of the scandal were ultimately plumbed.

It is an appropriate note to this period that two Attorneys General -- Kliendienst and Mitchell -- were eventually convicted of perjury before Congressional investigations.

EPA/Anne Gorsuch

Coming up to the 1980s, in 1982 the Congressional investigation of EPA's Superfund ran into Justice Department resistance based on claims very similar to those now being put forth on the INSLAW matter by Attorney General Thornburgh -- claims which were thoroughly overcome and discredited. Specifically, when House Committees investigated political interference with EPA's Superfund, the Attorney General responded that Administration documents would be withheld because they contained legal analysis and because of parallel pending proceedings. The Judiciary Committee ultimately investigated and revealed the impropriety of that withholding in its Report of the Committee on the Judiciary on Investigation of the Role of the Department of Justice in the Withholding of EPA Documents from Congress in 1982-83 H.R. Rep. No. 435, 99th Cong., 1st Sess. (1985) ("Justice Department Withholding Report").

To quote the Attorney General's description of what was withheld during the EPA scandal, which sounds strikingly similar to Attorney General Thornburgh's current letter regarding INSLAW:

> The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar

> materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

Letter from the Attorney General to Chairman Dingell, November 30, 1982, in Justice Department Withholding Report at 1169. There is little to choose between the Attorney General's claim then -- purporting to withhold documents on the basis that they contained "legal analysis," would reveal "enforcement strategy," and that they might "affect a pending enforcement action" -- and the current INSLAW claim, except that the claim of Attorney General Thornburgh, regarding a civil case which is now on appeal, presents an even weaker basis for withholding.

As you will recall, the House did not accept this basis for withholding, even though the Attorney General supported it with a claim of executive privilege by President Reagan. When the Administration continued to withhold the documents, the House of Representatives certified a contempt of Congress citation for Anne Gorsuch, the EPA Administrator. The Justice Department attempted to sustain its withholding of those documents by filing United States v. House of Representatives in the United States District Court for the District of Columbia. The office of General Counsel to the Clerk appeared on behalf of the House of Representatives in opposition to the Justice Department in the case. After we presented briefing and argument, the court rejected the Justice Department's position, confirmed the House's position and dismissed the Justice Department's suit. Id., 556 F. Supp. 150 (D.D.C. 1983). This cleared the way for a criminal prosecution of the administrator who had withheld documents at the Attorney General's

direction. At this stage, the resistance to oversight had been totally discredited, and the Administration released the documents.

There followed an investigation by the Judiciary Committee, in which the Justice Department, despite all those pending proceedings cited by the Attorney General in his withholding directions, produced its internal documents, whether they contained legal analysis, policy discussions, or anything else.

It is an appropriate note to this period that the Attorney General was required to apply for an Independent Counsel who investigated a conspiracy to obstruct at the Justice Department, and false testimony by departmental officials, involving the Justice Department's highest levels. The challenge to the constitutionality of this Independent Counsel, which the Justice Department joined in urging, reached the Supreme Court, which confirmed Congress's position and rejected the Justice Department's, in Morrison v. Olson, 487 U.S. 654 (1988).

Iran-Contra

Even more recently, in the late 1980s, an intense Congressional investigation focused, in part, on Attorney General Meese's conduct during the Iran-contra scandal. The House and Senate created their Iran-contra committees in January, 1987, on which, of course, both the former and current Chairmen of the Judiciary Committee served. The Iran-contra committees demanded the production of the Justice Department's files, to which Assistant Attorney General John Bolton responded, on behalf of Attorney General Meese, by attempting to withhold the documents on the claim that providing them would prejudice the pending or

anticipated litigation by the Independent Counsel. The Iran-Contra committees overruled that contention, required the furnishing of all Justice Department documents, and questioned all knowledgeable Justice Department officers up to, and including, Attorney General Meese.

One major aspect of the Iran-Contra Committees' investigation focused on the inadequacies of the so-called "Meese Inquiry," the team led by Attorney General Meese which looked into the NSC staff in late November, 1987. As the Iran-Contra Committees found, this so-called inquiry had the effects that by their questioning, the NSC staff was forewarned to shred their records and fix upon an agreed false story, and by the Meese Team's methods was foreclosed the last vital opportunity to uncover the obscured aspects of the scandal. The Congressional investigation uncovered extensive documentary evidence regarding incompetence, at best, by the Attorney General's inquiry team during the Meese Inquiry. The Congressional report summed up such matters as the Attorney General's taking no notes and remembering no details of his crucial interviews of CIA Director Casey and others, the Justice Department inquiry's not taking any steps to secure the remaining unshredded documents, and the Justice Department team's even allowing the shredding to occur while the team was in the room; the inquiry team excluded the Criminal Division and the FBI from the case until it was too late, and then the Attorney General gave his famous press conference of November 25, 1986, with an account that in key respects misstated and concealed embarrassing information which had

been furnished to him.[3] Had the Iran-Contra committees accepted the pendency of litigation as an excuse for not probing, the "Meese Inquiry" would have gone virtually unquestioned.

Soon thereafter Attorney General Meese resigned and was replaced by Attorney General Thornburgh.

II. IN LIGHT OF CONGRESS'S BROAD POWER OF INVESTIGATION, THE ASSERTED REASONS PUT FORTH BY THE ATTORNEY GENERAL ARE WITHOUT MERIT

It is thus apparent that time and again, Attorneys General have put the excuse of pending proceedings as a basis for avoiding legitimate Congressional oversight; that the Supreme Court has confirmed the validity of such oversight; that Congress has time and again insisted, successfully, on obtaining the internal records of the Department despite such claims by Attorneys General; that when Congress has done so, it has been vindicated by the discovery of waste, fraud, abuse, and criminality; and that often Attorneys General have been convicted, or required to resign, after the crumbling of such claims for withholding records.

We turn now to our review of the particular doctrines put forward by the Attorney General as they bear on these documents. Above all, the Attorney General's claim turns on the asserted principle that the mere pendency of a civil case allows the

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[3] Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No. 433 & S. Rep. No. 216, 100th Cong., 1st Sess. 310 (no notes), 313 (no securing documents), 314 (excluding Criminal Division), and 317-18 (press conference) (1987). Attorney General Meese's role was further analyzed in the additional views of four House committee chairmen, id. at 643-47. "Although the Attorney General testified in deposition at some length, he responded that he did not know, could not remember, did not recall, had no recollection, or some similar formulation some 340 times." Id. at 647.

blocking of oversight, apparently based on a "waiver" theory that if documents were not withheld from Congress, the Justice Department would relinquish its privileges vis-a-vis the civil litigants. As noted, Attorney General Thornburgh describes his "obligation" as being "to protect documents compiled by attorneys in connection with pending litigation, which are not in the public domain."

This position is without merit, on a number of bases. As discussed above, the Supreme Court, in Sinclair v. United States, 279 U.S. 263 (1929), addressed the case of a witness who refused to provide evidence on the ground that a lawsuit was pending. Id. at 290. The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in strong terms the witness's contention that the pendency of lawsuits gave an excuse for withholding. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws." Id. at 295. The Court held: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." Id. (emphasis added).

In an important decision, the D.C. Circuit specifically considered, and rejected, the argument that Congress's obtaining

documents somehow constituted a "waiver" of privileges regarding these documents. The case of Murphy v. Department of the Army, 613 F.2d 1151, 1155 (D.C. Cir. 1979), discussed with respect to the "doctrine[] of waiver" that "it is evident that the disclosure to the Congress[] could not have had that consequence." Congress has long "carve[d] out for itself a special right of access to privileged information not shared by others." Id. at 1155-56. If "every disclosure to Congress would be tantamount to a waiver of all privileges and exemptions, executive agencies would inevitably become more cautious in furnishing sensitive information to the legislative branch -- a development at odds with public policy which encourages broad congressional access to governmental information." Id. at 1156.

What the D.C. Circuit warned against, Attorney General Thornburgh now seeks to bring about, except with the twist that even though the waiver argument was slain, the Attorney General would still use it as an excuse. Thus, the D.C. Circuit vindicated the "public policy which encourages broad congressional access to governmental information," by extirpating the waiver argument. Yet, nevertheless, this "executive agency" is trying to "become more cautious in furnishing" what it considers "sensitive information to the legislative branch." In sum, the Attorney General attempts to cloak himself in a "waiver" argument which has been rejected in the courts precisely to prevent him from so cloaking himself.

The Attorney General's claim must be considered against the background of the Committee's investigative power. Eastland v.

United States Servicemen's Fund, 421 U.S. 491 (1975) explains that "'(t)he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.'" Id. at 504 n.15 (quoting Barenblatt v. United States, 360 U.S. 109, 111 (1959)). "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." Watkins v. United States, 354 U.S. 178, 187 (1957).

Congressional investigative power is at its peak, as in the Inslaw matter, when the subject is alleged waste, fraud or abuse within a government department, such as the Justice Department. The investigative power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." Id. "[T]he first Congresses" held "inquiries dealing with suspected corruption or mismanagement of government officials." Id. at 192. In a series of Supreme Court cases, "(t)he Court recognized the danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered." Id. at 194-95. Accordingly, the Court recognizes "the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." Id. at 200 n.33.

In this instance, the Attorney General compounds the weakness of his assertion by using as a cloak a civil case which is not even facing trial any more. As he acknowledges, the case is on appeal.

In his letter, Attorney General Thornburgh says, "We do not regard work product generated while the case is in one court to be less sensitive simply because the case is currently under consideration in another court."

This is a transparent device for minimizing the significance of the fact that the pre-trial proceedings in the federal court system are past.[4] When discovery is over, when a trial is over, the Attorney General has more than a situation where "the case is currently under consideration in another court." It is not merely "in another court"; it is past the stage of consideration in an evidence-hearing district or bankruptcy court, and the evidence-taking record has been closed. The elementary principle that records lose their sensitivity as a case passes out of evidence-gathering stages is known even in the context of grand jury transcripts, where, unlike for these records, there is a privilege relating to the criminal process codified in an express rule of criminal procedure. Even in that context, as a case moves from the preindictment to the postindictment stage, and the grand jury is no longer gathering evidence, the sensitivity of records diminishes and their availability increases. See, e.g., Douglas Oil Co. of

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[4] An argument that, apart from pendency in the federal courts, there are administrative proceedings would be wholly frivolous. Given the number, variety, and duration of administrative proceedings, an assertion that these are a basis for blocking oversight amounts virtually to an assertion that there should not be any oversight. For example, if contract dispute proceedings between the Pentagon and defense contractors were an excuse for withholding documents regarding defense procurement fraud, there would be virtually no oversight possible over defense waste and fraud. If the Attorney General seriously intends to take this position, he would have to do so explicitly.

California v. Petrol Stops Northwest, 441 U.S. 211, 219 n.10 (1979); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940). A fortiori, in the mere civil context, when a case's discovery and trial phases are past, the Attorney General has little basis for withholding records on the plea that the appeal is still pending. One can hardly see an end, considering that it lies in the Justice Department's power to prolong appeals to en banc or higher tribunals even longer.

The Department of Justice raises three privilege doctrines in its attempt to withhold documents from this Committee's investigation into the INSLAW matter. The Department asserts that the documents are covered by the "work product" doctrine, the "deliberative process" doctrine and the attorney-client privilege.

First, it should be noted that each of these doctrines has arisen, and been applied by the courts, in the context of judicial proceedings. They have been developed by the courts in common law to be used in the judicial forum. These judge-made doctrines are to be sharply contrasted with constitutional privileges and immunities, such as the Fifth Amendment right against self-incrimination, which the Constitution makes applicable to both the courts and the legislature. The context of congressional oversight has its own history, as summarized above in the discussion of attempted Attorney General withholdings in the past.

Moreover, by their own terms, none of the doctrines asserted by the Department would justify withholding in this instance. As regards the qualified "work product" privilege, it has always been held that the privilege is overcome by a sufficient showing of

need. The Supreme Court indicated, in the very case in which it created the doctrine, that "[w]e do not mean to say that all [] materials obtained or prepared . . . with an eye toward litigation are necessarily free from discovery in all cases." Hickman v. Taylor, 329 U.S. 495, 511 (1947).

Thus, the courts have repeatedly held that the "work product" privilege is not absolute, but rather it is only a qualified protection against disclosure.[5] As one court has indicated, "its immunity retreats as necessity and good cause is shown for its production in a balance of competing interests." Kirkland v. Morton Salt Co., 46 F.R.D. 28, 30 (N.D. Ga 1968).[6]

In fact, because the "work product" doctrine is so readily overcome when production of the material is important to the discovery of needed information, some courts have refused to call the doctrine a privilege. For instance, in City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962) cert. denied sub. nom, General Electric Company v. Kirkpatrick, 372 U.S. 943 (1963), the court stated that the "work product" principle "is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case."

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[5] See, e.g., Central National Insurance Co. v. Medical Protective Co. of Fort Wayne, Indiana, 107 F.R.D. 393, 395 (E.D. Mo. 1985); Chipanno v. Champion International Corp., 104 F.R.D. 395, 396 (D. Or. 1984); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 446 (W.D. Mo. 1976).

[6] "Special protection" is afforded to particular work product material that reveals the attorney's mental processes. Upjohn Co. v. United States, 449 U.S. 383, 400-401 (1981).

Similarly, the "deliberative process" doctrine is also limited. "Neither the predecisional deliberative process privilege nor the work-product privilege is absolute, and each can be overcome if the party seeking discovery shows sufficient need for the otherwise privileged material." Resident Advisory Bd. v. Rizzo, 97 F.R.D. 749, 752 (E.D. Pa. 1983) (citations omitted). See also, Lundy v. Interfirst Corporation, 105 F.R.D. 499 (D.D.C. 1985).

In the context of governmental investigations the qualified "work product" and the "deliberative process" doctrines, therefore, must, and do, give way to the public interest in ferreting out fraud, waste and abuse. The courts have recognized that both doctrines -- "work product" and "deliberative process" -- "obstruct the search for truth and because their benefits are indirect and speculative, they must be strictly construed." Lundy, 105 F.R.D. at 504.

> [A] Court must therefore, assure that these privileges are not applied "in a manner which will impede the search for truth in circumstances where the policies underlying these privileges will not be served."

Resident Advisory Bd. v. Rizzo, 97 F.R.D. at 752 (E.D.Penn. 1983) (quoting In re Grand Jury Proceedings, 557 F. Supp. 1053, 1055 (E.D. Pa. 1983)).

Congressional investigations have long been likened to grand jury proceedings in their inquest-like function, and routinely, grand jury subpoenas calling for documents important to the

criminal investigation are upheld over attorney "work product" claims.[7] As explained in one such case:

> [I]n an independent grand jury proceeding . . . the work-product privilege is displaced by the grand jury's authority and need to accomplish its investigatorial duty. The powers and prerogatives of a grand jury to do its work must be protected vigorously and construed liberally.

In re Grand Jury Proceedings, 73 F.R.D. 647, 653 (M.D. Fla. 1977) (emphasis added) (citations omitted).

Obviously such is the case, and to an even greater degree, when the "work product" or the "deliberative process" doctrine is considered against the needs of a congressional investigation examining executive branch improprieties. Congressional oversight of the government's programs and activities is a constitutionally grounded function of the Congress and of critical national importance. In short, neither the "work product" nor the "deliberative process" doctrine will support the withholding of documents from this Committee in its performance of its constitutional responsibilities.

As to the small set of documents for which any legitimate attorney-client privilege claim could be made against a private party seeking documents,[8] the privilege is not apposite in this

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[7] See, e.g., In re Grand Jury Subpoena dated Nov. 9, 1979, 484 F. Supp. 1099 (S.D.N.Y. 1980); In re Grand Jury Subpoena dated Dec. 19, 1978, 81 F.R.D. 691 (S.D.N.Y. 1979); In re Grand Jury Investigation, 599 F.2d. 1224 (3rd Cir. 1979); In re Sept. 1975 Grand Jury Terms, 532 F.2d 734 (10th Cir. 1976).

[8] Just as Parliament declined to accept attorney-client privilege, so Congress, whose powers in this regard were developed on the model of Parliament's, decides for itself when and whether to accept attorney-client privilege. See, e.g., Proceedings Against Ralph Bernstein and Joseph Bernstein, H.R. Rep. No. 462,

oversight investigation by this committee. It is axiomatic that within one continuing institution, such as a partnership, a corporation -- or the government -- officers and officials cannot assert attorney-client privilege against the institution itself, for the privilege belongs to the institution, not the individual. For example, the Supreme Court held in Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 349 (1985), that "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. . . . Displaced managers may not assert the privilege over the wishes of current managers. . . ." In investigation within an institution -- an internal corporate inquiry, or, within the federal government, a Congressional inquiry -- the authority to investigate belongs to the duly authorized investigative body, which is not constrained in the same manner as an outside entity. In the related context of shareholder suits, the courts have held:

> But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the [attorney-client] privilege be subject to the right

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99th Cong., 2d Sess. (1986); 132 Cong. Rec. H 666-685 (daily ed. Feb. 27, 1986); Attorney-Client Privilege: Memoranda Opinions of the American Law Division, Library of Congress, Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th COng., 1st Sess. (Comm. Print June 1983). It is unnecessary to address this in detail, however, as the case law discussed above reflects that even in a judicial forum, just as corporate officers could not assert attorney-client privilege against their board of directors, so department officials cannot assert it against Congress.

> of the stockholders to show cause why it should not be invoked in the particular instance.

Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970).

Any opposing principle would allow federal officials to shield themselves, not just from Congressional scrutiny, but from inspector general and prosecutorial scrutiny, just as, in the corporate context, it would allow them to shield themselves from directorial and internal audit scrutiny. That simply could not be allowed. Federal attorneys do not work on a payroll provided by any Mr. Thornburgh; they are on the federal government's payroll, and their advice comes with the understanding that advice by the federal government, to the federal government, is subject to oversight of the federal government. What boards of directors and successor managements do in corporations, Congress does in the government.

Mr. BROOKS. Thank you very much for an interesting analysis of this entire problem. I have been dealing with it in several instances—the Nixon impeachment and the Iran-Contra—and I have listened to it before, but you bring it together very nicely, Mr. Ross, and we are impressed with the work of you and your staff. We might recall that Mick Long worked on the committee for a while, and we are delighted to see you over there with the long-headed folks.

If the Attorney General continues to refuse information requested, what are the committee's options, Mr. Ross?

Mr. ROSS. If the Attorney General continues to refuse to provide the committee with the information it deems necessary, of course the next step for the committee to take would be to issue a subpoena demanding production of the documents.

It is unfortunate that a committee of the Congress would have to resort to the use of compulsory process to get from an executive agency that it has oversight authority over documents necessary to a particular oversight problem, but that is something that does from time to time occur, and of course that puts into motion a process by which a continued refusal to provide the information could be punished as a matter of Federal law either by a prosecution under the contempt statute or even by the utilization of Congress' inherent contempt authority if the Congress chose not to go—if the House chose not to go the statutory contempt route.

There are other means that committees have in the past found to be persuasive in obtaining documents or information from the executive branch, and I return to a matter I have discussed before, which is that it is this committee that has the responsibility for authorizing the actions of the Department of Justice.

Mr. BROOKS. And we have been more than generous—more than generous.

Mr. ROSS. It has been said that perhaps Congress' greatest power is the power of the purse, and Congress has from time to time seen fit to utilize that power.

Mr. BROOKS. Well, Steve, you will recall when I made a motion that we withhold some certain moneys from Attorney General Meese's office, and the Appropriations Committee acted on that basis, and very shortly Mr. Meese agreed with the district judges that maybe they did know what they were talking about.

Mr. ROSS. I remember it was very efficient in getting the Department's attention.

Mr. BROOKS. We are not quite at that stage, however, with Mr. Thornburgh, the appropriation having already been passed, but those things always come up again, don't they?

Mr. ROSS. It was part of the framers' wisdom that the Constitution does not provide for appropriations for the executive branch that are without time limit. Part of the genius of the system envisioned by the framers and implemented by the Congress is that the executive branch would have to return on a regular basis to the people's elected representatives to seek the funding and authorization for their activities.

Mr. BROOKS. Is there any question whether the courts would fail to support the committee's requests for documents from the Attorney General in your mind?

Mr. Ross. It is my belief and analysis that the Attorney General's position in this matter that has been advanced so far is without legal support and that, therefore, if it came to be tested before the courts, that the courts would reject the Attorney General's position.

Mr. BROOKS. The D.C. Bar recently revised its rules regarding attorney-client privilege. Could these changes in any way have an effect on the Congress' ability to obtain information from the executive branch attorneys?

Mr. Ross. I don't believe so, Mr. Chairman. Let me state first off that there is no indication that the bar rules were intended to apply to communications or representations to the Congress of the United States. Certainly there is no indication that it was meant to interpose between the branches in ongoing oversight.

Let me further add that it is contrary to constitutional wisdom that a cartel of lawyers could come forth with self-governing rules that would alter the basic interactions and balance of powers between the branches of government.

Mr. BROOKS. We are not clients, anyhow; we are not clients; I didn't hire them. We surely are not clients of the Justice Department, or we are in deep trouble.

Do you agree with the Justice Department that the list of privileged documents that have been provided to the committee are of such a confidential nature that they should never go into the public record, even have any possibility of the public finding out what they have been doing?

Mr. Ross. I am somewhat at a loss to answer that question in full, not being either an expert in the INSLAW matter specifically or having had access to the documents. The Department, of course, would have litigative, and, as someone who engages in litigation, I understand the desire to achieve and maintain whatever litigative advantage one might have over an opponent. The Department, of course, might have some desire to achieve or maintain a litigative advantage. Their list seems to be extraordinarily long.

I would suggest that the determination as to whether documents furnished by the Department of Justice should be kept in executive session type treatment by the committee or not is one which has in the past been normally made by committees after they have had access to such documents and that reflects the wisdom of committees of the Congress which, after all, are made up of people elected by the people of the United States to exercise judgment of that nature with respect to the specific documents, and so I think that is a determination that the committee would have to make.

There have been many times that committees have afforded executive branch agencies or other entities providing documents with various degrees of confidentiality in terms of the treatment of documents. There are times that that might be justified. There are other times that it, frankly, is not justified. If we look back to the EPA battle that I mentioned before, in that instance the Department originally had claimed that all the documents were sensitive in the sense of being enforcement sensitive or relevant to ongoing or pending litigation. It turned out that many of the documents bore no relationship to litigation or enforcement matters and had been withheld merely because they were politically embarrassing.

So, clearly, it is not until the committee has an opportunity to look at the documents that a proper decision can be made as to how the committee should utilize those documents.

Mr. BROOKS. The Attorney General has, in recent months, attempted to assert broad claims of executive power in dealing with the Congress. Would you give us a short summary of these efforts?

Mr. ROSS. If I might defer on that question to Mr. Tiefer, the deputy counsel, who has been working closely with a number of committees involved in that area.

Mr. BROOKS. All right.

Mr. Tiefer.

Mr. TIEFER. Thank you, Mr. Chairman.

After last year's authorization hearings, the chairman proposed questions to the Department of Justice concerning its assertions that it could refuse—that the administration could refuse to obey laws even after they were enacted—that is, not just veto them and attempt to get its veto sustained but refuse to obey them—and this was a surprising reawakening of the position that had been taken on the Competition in Contracting Act when they had refused to obey the law even though it had been enacted.

As you will recall, at that time, when the position was taken that it could simply send an OMB memorandum to refuse to obey laws, first this committee took the action that you mentioned of withholding funds for the Attorney General's office, and then the House appeared in litigation in the *Ameron* and *Lear-Siegler* cases, both of which upheld the Congress' position and rejected the administration's position.

A second controversy concerns the Attorney General's contention that laws affecting foreign policy initiatives are unconstitutional. On both those points we are submitting memoranda to the committee which show that both the position that the executive branch can refuse to obey laws and that the Congress has no right to make enactments concerning foreign policy are unconstitutional positions.

Mr. BROOKS. And, without objection, we will put in the detailed responses you have prepared for us, you and others on Mr. Ross' staff.

[The information follows:]

Donnald K. Anderson
Clerk

Steven R. Ross
General Counsel

Office of the Clerk
U.S. House of Representatives
Washington, DC 20515-6601

October 10, 1990

MEMORANDUM

TO: The Honorable Jack Brooks
Chairman
Committee on the Judiciary

FROM: Steven R. Ross SRR
General Counsel to the Clerk

Charles Tiefer CT
Deputy General Counsel to the Clerk

SUBJECT: Justice Department Claim of Power to Declare Laws Unconstitutional, Previously Rejected in the CICA Cases

By Attorney General Richard Thornburgh's letter of August 7, 1990 ("Thornburgh Memorandum" or "Thornburgh Response"), at pages 2-5, responding to a question posed by Chairman Brooks following up the annual authorization hearings for the Department of Justice, the Attorney General claims the power to decide which laws he considers unconstitutional and "to refuse to enforce unconstitutional laws." As the Justice Department's claim is generally understood, it means that whenever the Justice Department is willing to write an opinion about a law the Administration dislikes, saying the law does not agree with the Department's own sweeping view of the Executive's prerogatives, OMB can issue a government-wide directive to disregard the law. It claims that the Constitution "impose[s] upon the President the responsibility to decline to enforce laws that conflict" with his view of his

prerogatives, and that "The President's oath of office is the other constitutional provision authorizing him to refuse to enforce an unconstitutional law." Thornburgh Memorandum at 2.

With regard to this issue, the Attorney General performs an astonishing act of selective memory: he discusses the Justice Department's position that was extensively litigated in recent years between the House and the Department, without ever recalling how the Judiciary decided the issue. Attorney General Thornburgh cites repeatedly from the Justice Department's position in the Competition in Contracting Act (CICA) controversy.[1] Yet, when the Executive made this claim, and the Judiciary addressed that claim, the Judiciary decisively rejected the Executive claim of power. By pressing this defeated claim, the Executive now affronts both the Legislative and the Judicial branches.

In late 1984, after President Reagan signed the Competition in Contracting Act into law, on Attorney General Meese's advice the

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[1] First, he quotes the Attorney General letter in CICA. "Attorney General William French Smith said that the decision not to enforce the Competition in Contracting Act was based upon 'the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress,' the President's 'constitutional duty to protect the Presidency from encroachment by other branches,' and the President's oath to 'preserve, protect and defend' the Constitution." Thornburgh Response at 3-4.

Then, he quotes the Deputy Attorney General testimony in CICA. "The Department has testified that 'until a law is adjudicated to be unconstitutional, the issue of enforcing a statute of questionable constitutionality raises sensitive problems under the separation of powers.' Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 318-19 (1985) (statement of Acting Deputy Attorney General D. Lowell Jensen). Thornburgh Response at 4.

Office of Management and Budget issued Bulletin No. 85-8 entitled Procedures Governing Implementation of Certain Unconstitutional Provisions of the Competition in Contracting Act. This was an infamous historic first: the first such government-wide order in history directing executive agencies not to obey a law because the Justice Department had declared it unconstitutional. There was an immediate outcry, and Congress held hearings developing extensive precedent against this novel Executive claim of a power belonging solely to the Judiciary. Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. (1985).

Even while both Congress and, eventually, the courts rejected the Justice Department's position, Attorney General Meese continued and expanded his claim of power. Thus, at the 1985 DOJ authorization hearings, Attorney General Meese told this committee that while he was competent to decide whether to consider laws unconstitutional, courts were not:

> Mr. Brooks. Mr. Attorney General, I don't want to belabor the problem. Do you feel the Executive Branch may suspend a duly enacted law?
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> Mr. Meese. I don't believe the Executive Branch can suspend a duly enacted law. I do think the Executive Branch has a responsibility, and I am answering the broader aspect of your question that I think is implicit -- I think the Executive Branch, like the Legislative Branch, has to carry out its responsibilities under the Constitution and where these responsibilities under the Constitution conflict with enforcing a specific provision of a law, then I think, as case law provides, there is a responsibility on the Executive Branch not to enforce a law or a

> portion of a law which it feels is unconstitutional.
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> Mr. Brooks. Now, Mr. Attorney General, I want to say that a Federal court, which normally would have the responsibility of determining constitutionality under the Constitution, concluded on March 27, 1985, a very recent case, that the Competition in Contracting Act is constitutional. You may not have had a chance to look it over.
>
> Mr. Meese. I have, Mr. Brooks.
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> Mr. Brooks. You do recall that the court. . . . found it constitutional and my question is: Why haven't you rescinded those previous directions to the OMB to order the defiance of a law that this court has now approved? Or do you plan to continue the Executive Branch on its course of willful disobedience.
>
> Mr. Meese. I am sure you know, Mr. Brooks, that a civil court is not competent to decide on the constitutionality of a law unless and until it has received appellate consideration, ...

Department of Justice Authorization for Fiscal Years 1986 and 1987: Hearings Before the House Comm. on the Judiciary, 99th Cong., 1st & 2d Sess. 38 (1985-86) ("CICA Hearings"). Both the Judiciary Committee and the Government Operations Committee reviewed the Executive claim and strongly rejected it in extensive reports. The President's Suspension of the Competition in Contracting Act is Unconstitutional, H.R. Rep. No. 138, 99th Cong., 1st Sess. (1985) ("Suspension/Unconstitutionality Report"; H.R. Rep. No. 113, 99th Cong., 1st Sess. (1985) (annual authorization report of the Committee on the Judiciary).

Like Attorney General Meese, so Attorney General Thornburgh initially presents this claim up in the language of judicial review

-- that the Executive is simply obeying the Constitution if it were to decide not to obey laws. "Where a statute enacted by Congress conflicts with the Constitution. . . . the President must heed the Constitution." Thornburgh Memorandum at 2. However, the Executive does not, of course, possess the characteristics justifying judicial review, namely, the judiciary's having no bias or interest in the disputes it decides, and the judiciary's being capable safely of wielding the power to say "what the law is" in the disputes of others which it adjudicates. The Executive, needless to say, has a direct interest in disputes involving it, and can hardly be viewed as judiciary-like in its neutrality.

When the U.S. Court of Appeals for the Ninth Circuit reviewed the Executive claim in one of the CICA cases, it flatly rejected this argument. "Here, the government reasserts the position taken by the Justice Department before Congress: that the President's suspension of the CICA stay provisions is justified, because the President's duty to uphold the constitutional and faithfully execute the laws empowers the President to interpret the Constitution and disregard laws he deems unconstitutional." Lear Siegler, Inc. v. Lehman, 942 F.2d 1102, 1121 (9th Cir. 1988).[2] The Court of Appeals concluded: "Because we regard this position as utterly at odds with the texture and plain language of the Constitution, and with nearly two centuries of judicial precedent, we must reject the government's contention. . . ." Id. The Court

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[2] The decision was subsequently vacated en banc in part on a separate issue regarding attorneys' fees.

of Appeals found "Not surprisingly, the government offers scant and extremely questionably support for this dubious assertion of power." Id.

The arguments presented by Attorney General Thornburgh's response are the very same ones previously given to the House, about which the Court of Appeals commented that "The Justice Department's presentation to the House of Representatives was similarly devoid of legal authority." 942 F.2d at 1121 n.14. The Department notes that the Framers gave the President the veto power to protect himself against laws he disapproves, admitting "[t]he veto power is the primary tool available to the President," but claiming it is not "the only tool at the President's disposal." Thornburgh Response at 4. When the Court of Appeals reviewed this argument, it explained that the Framers had refused to give the President a line item veto, and then observed that "the executive branch's action in this case assumes a power far more extensive than would be conferred by a 'line item veto,'" since "unilateral suspension of the CICA stay provisions in this case afforded no opportunity for a congressional override." 842 F.2d at 1124. "Certainly the framers were strongly opposed to the idea of an absolute veto power for the President," and thus, "Such an incursion into Congress's essential legislative role cannot be tolerated." Id.[3]

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[3] Attorney General Thornburgh's Response serves up a collection of Justice Department letters and opinions, private letters, and a quote from one Framer. It is virtually devoid of judicial authority except for reciting INS v. Chadha, 462 U.S. 919, 942 n.13 (1983), since in Chadha the Justice Department presented

Lacking the power of judicial review, Attorney General Thornburgh seeks refuge in how "The President has the constitutional duty to "take Care that the Laws be faithfully executed," Art. II, sec. 3. . . . [Because] the Take Care Clause requires the President to faithfully execute the laws . . . the President [can] refuse to execute a law he believes is contrary to the supreme law, the Constitution." Thornburgh Memorandum at 2. However, "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (quoting Holmes, J.). The Justice Department's strained view of the Faithful Execution Clause was decisively rejected by the Court of Appeals, Lear Siegler, 842 F.2d at 1124-25:

> The government's contention was addressed and rejected by the Supreme Court 150 years ago, in Kendall v. United States, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838). There, the Court affirmed the issuance of a writ of mandamus ordering the Postmaster General, then a cabinet official, to settle certain claims with mail contractors as required of him by an act of Congress. The Attorney General's lawyer defended the Postmaster General's nonfeasance by relying on the President's full and exclusive duty to execute the laws, 37 U.S. (12 Pet.) at 545-47, 612, but the Court disagreed.
>
> "To contend that the obligation imposed on the President to see the laws faithfully executed,

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in court arguments against the legislative veto. As always, the Department simply overlooks that in Chadha it did not employ any power to refuse to obey statutes; on the contrary, it obeyed the statute as constitutional up to the point at which a court -- not a mere Executive official -- ruled otherwise.

> implies a power to forbid their execution, is a novel construction of the Constitution and entirely inadmissible." 37 U.S. (12 Pet.) at 613. See also United States v. Smith, 27 F.Cas. 1192, 1230 (Cir. Ct. D.N.Y. 1806) ("The president of the United States cannot control the statute, nor dispense with its execution"); Da Costa v. Nixon, 55 F.R.D. 145, 146 (E.D.N.Y. 1972) (Once bill was passed by Congress and signed by the President, "[n]o executive statement denying efficacy to the legislation could have either validity or effect"); Catano v. Local Board, 298 F. Supp. 1183, 1188 (E.D. Pa. 1969) ("The President is not at liberty to repeal Congressional enactments.").

The other main CICA case including a careful study of the history of the Faithful Execution Clause rejecting the Executive's strained claim:[4]

> During the reign of absolute British monarchs, the notion that the Executive, at the time the King, could decide for himself, without a decision of the courts, which laws should be obeyed was put to the test. . . .
>
> Shortly thereafter, James II was forced into exile in the Glorious Revolution of 1689, and the English Bill of Rights was enacted. The first article of that historic charter of freedom declared 'That the pretended power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal.' Scholars have concluded that the 'faithful execution' clause of our Constitution is a mirror of the English Bill of Rights' abolition of the suspending power,' that is, the abolition of what the English Bill of Rights had called 'the pretended (Royal) power of Suspending.'"

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[4] For further discussions of this history, Suspension/Unconstitutionality Report at 10; CICA Hearings at 264; Reinstein, An Early View of Executive Powers and Privileges: Trial of Smith and Ogden, 2 Hastings Con. L. Quart. 309, 321 (1975); Stewart, The Trial of the Seven Bishops, Cal. St. Bar. J., Feb. 1980, at 70 (account of 1688 case).

Ameron, Inc. v. U.S. Army Corps. of Engineers, 610 F. Supp. 750, 755 (D.N.J. 1985) (quotation omitted).[5] The Supreme Court's rejection of Executive claims of power to decide not to execute laws traced directly back to the revulsion, after the English Bill of Rights, against the royal "dispensing" or "suspending" power which had been abused by the Stuart monarchs to nullify Parliamentary laws.[6]

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[5] The district court case was subsequently affirmed on appeal, 787 F.2d 875, 889-90, modified, 809 F.2d 979 (3d Cir. 1986), and the Supreme Court first granted, and then dismissed certiorari, cert. dismissed, 109 S. Ct. 297 (1988).

[6] As the District Court noted:

> Any possible doubt about the matter was resolved in the historic case of Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) . . . . The Supreme Court said that '[t]o contend, that the obligation imposed on the [P]resident to see that the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.'

Ameron, 610 F. Supp. at 756 (quotation omitted) (quoting Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838).

The Supreme Court further explained regarding the specious claim of power from the "faithful execution" clause:

> that the effect of such power would be the 'vesting in the [P]resident [of] a dispensing power, which has no countenance for its support, in any part of the constitution; [such an argument is] asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the [P]resident with a power entirely to control the legislation of [C]ongress, and paralyze the administration of justice.'

Ameron, 610 F. Supp. at 756 (quotation omitted), quoting Kendall v. United States, 37 U.S. at 613 (emphasis supplied.)

"[T]he abuse of regal authority in England was much on the framers' minds."[7] Accordingly, the Constitutional Convention expressly rejected any Presidential power to suspend Acts of Congress, binding the President instead to obedience with faithful execution clause. The Framers intended that only the courts -- not the President -- could declare statutes unconstitutional.[8]

CONCLUSION

The Executive prerogative to declare laws unconstitutional was decisively rejected by Congress and the courts in the Lear Siegler and Ameron cases when Attorney General Meese asserted it. That claim is completely without merit.

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[7] Suspension/Unconstitutionality Report at 14 (citations omitted).

[8] Ameron, 610 F. Supp at 756; Suspension/Unconstitutionality Report at 10-14, Supp. App. 221-25 (including Alexander Hamilton's discussion); H.R. Rep. No. 113, supra, at 14.

Donnald K. Anderson
Clerk

Steven R. Ross
General Counsel

Office of the Clerk
U.S. House of Representatives
Washington, DC 20515-6601

October 10, 1990

MEMORANDUM

TO: The Honorable Jack Brooks
Chairman
Committee on the Judiciary

FROM: Steven R. Ross SRR
General Counsel to the Clerk

Charles Tiefer CT
Deputy General Counsel to the Clerk

SUBJECT: Justice Department Claim of Unconstitutionality of Laws (1) Seeking Information or (2) Promoting Foreign Affairs Initiatives

By Attorney General Richard Thornburgh's letter of August 7, 1990 ("Thornburgh Memorandum" or "Thornburgh Response"), responding to a follow-up question posed by Chairman Brooks after the annual authorization hearings for the Department of Justice, the Attorney General has made a broad claim of Executive prerogatives to withhold information and to exclusively control national policy. On pages 10-11, the Thornburgh Memorandum asserts that laws mandating reporting to Congress are unconstitutional as violating the principle that "the President must withhold information from Congress where necessary to protect the national security," id. at 11-14, and similarly laws "requiring the President to disclose information relating to the negotiation of treaties" are unconstitutional. In the second assertion, on pages 7-10, the Attorney General contends that laws promoting or affecting foreign

affairs initiatives are unconstitutional. This assertion expands on the claims in President Bush's veto message for the joint resolution on the FS-X deal with Japan, by which the President denounced as unconstitutional any Congressional requirement that the United States discuss with Japan arrangements to prevent excessive donation to the Japanese of the technology underlying the American aircraft industry. As the Attorney General recites, "President Bush based his 1989 veto of the FS-X legislation in part upon his constitutional authority to control foreign negotiations:

> In the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. The Constitution provides that one voice is the President's.

Thornburgh Memorandum at 9 (quoting 25 Weekly Comp. Pres. Doc. 1191, 1192 (July 31, 1989)).

Each of these represents a legally unjustified expansion of Executive prerogative claims at the expense of the system of checks and balances. Each is addressed in turn below.

1. Asserted Unconstitutionality of Reporting Requirements

When the Justice Department volunteered a set of objections to a bill concerning the defense authorization (H.R. 2461, the Defense Department authorization for fiscal 1990, and the counterpart Senate bill), the Department challenged as unconstitutional a host of reporting requirements. "[S]ection 906(a) of Title IX (Senate) requires the President to submit to Congress a 'comprehensive report regarding the desirability of an agreement to impose limitations on anti-satellite capabilities.' Section 918(a)(3) of Title IX (Senate) requires . . . an

'assessment of the implications for United States security of a START agreement that allowed the Soviets as well as the United States to have an equivalent number of warheads on submarines that would not be accountable under START limits,' among other things." Justice Department Letter of Sept. 8, 1989, at 3. The Justice Department objected to these as unconstitutional, and to others as well. "Examples of parts of H.R. 2461 impermissibly requiring the President to submit such information include section 233(a)(5) of Title II (Senate), requiring the President to report on 'the status of consultations with other member nations of the North Atlantic Treaty Organization, Japan, and other appropriate allies concerning research being conducted' in the SDI program. Another example is section 938(d) of Title IX (Senate), requiring the President to report to Congress on the 'status and results of the negotiations' with Japan." Justice Department Letter of Sept. 8, 1989, at 2.

In response to a memorandum of this office refuting those assertions of unconstitutionality, the Thornburgh Memorandum now reiterates and expands the claim of unconstitutionality for all such provisions. "[T]he President must withhold information from Congress where necessary to protect the national security." Thornburgh Memorandum at 12. "The conduct of international negotiations is a function committed to the President by the Constitution, and he must have the authority to determine what information about such international negotiations may, in the public interest, be made available to Congress and when such disclosure should occur." Thornburgh Response at 11.

Attorney General Thornburgh proposes a radical change, and expansion, of Executive privilege. The standard oversight system consists of the Congressional Committees on defense, foreign affairs, intelligence, government operations, and others routinely requiring and receiving full reporting on defense and foreign affairs issues. The standard background also includes special and deep Congressional scrutiny of such national security matters and foreign affairs initiatives as the arms-for-hostages deal with Iran, defense procurement fraud, and intelligence agency abuse. No other mechanism exists for making the Administration accountable for abuses in these areas ranging from the Iran-Contra scandal to Pentagon waste.

It is one thing for a President, on rare occasions, to assert Executive privilege -- as President Reagan only did twice (in 1981 for James Watt and in 1982 for Anne Burford). In these situations, Congress then decides whether to accept or reject the claim (as Congress rejected both the Watt and Burford claims, and the information was then supplied, and President Reagan never afterward claimed executive privilege again). It is quite another to assert, as the Thornburgh Memorandum now does, that all the provisions of law which ask for a report or an explanation on a controversial issue such as whether to proceed with anti-satellite weapons, or allied burden-sharing, or allied help with the costs of SDI, or the potential for nuclear weapons limitation talks, must be rewritten not to mandate accountability lest they be deemed unconstitutional on its face.

The First Congress, authoritative interpreter of the Constitution, in one of its first acts, when creating one of the three original Cabinet Departments -- the Treasury Department -- imposed a reporting requirement to be invoked by Congressional bodies. The statute made it "the duty of the Secretary of the Treasury . . . to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the House of Representatives or the Senate, or which shall appertain to his office." Act of Sept. 2, 1789, ch. 12, §2, 1 Stat. 65 (1789). With slight modifications, the statute has remained in effect for two centuries. 31 U.S.C. § 1002.[1] Hundreds of successor statutes impose similar requirements. In INS v. Chadha, 462 U.S. 919 (1983), itself, the Supreme Court, after holding legislative vetoes unconstitutional, distinguished such statutory reporting requirements as perfectly constitutional: "formal reporting requirements, lie well within Congress' constitutional power . . . See also n.9, supra." 462 U.S. at 955 n.19. The footnote referred to, note 9, discusses approvingly other reporting requirements. Id. at 935 n.9.

Most recently, in upholding the independent counsel statute against attack by the Department of Justice, the Supreme Court noted the statute's provisions that certain Congressional Committee Members could trigger a sequence ending in a reporting requirement,

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[1] For a full discussion, see Tiefer, Independent Executive Officers as Checks on Abuses of Executive Power, 53 B.U.L. Rev. 59, 71-72 (1983), and sources cited.

and confirmed that such statutes were perfectly constitutional. "[T]he Attorney General . . . must respond within a certain time limit. §529(g). Other than that, Congress' role under the Act . . . [is] receiving reports or other information and oversight of the independent counsel's activities, § 595(a), functions that we have recognized generally as being incidental to the legislative function of Congress. See McGrain v. Daugherty, 273 U.S. 135, 174 (1927)." Morrison v. Olson, 108 S. Ct. 2597 (1988).

From the first administration, when the House required the providing of military records regarding the disastrous St. Clair expedition, and the Senate required the providing of foreign affairs records regarding the Jay Treaty,[2] Congress has insisted on receiving reporting of confidential national security information. The Thornburgh Response places great weight on an internal Cabinet note when "[t]he House of Representatives was then investigating the failure of General St Clair's military expedition against the Indians," but as the Attorney General admits, whatever was said internally, "The President ultimately decided to produce the requested documents." Thornburgh Response at 10.[3]

The notion that diplomatic exchanges historically have achieved some sacrosanct quality, so that Congress should not even seek to see them, is nonsense. Perhaps the most famous diplomatic

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[2] R. Berger, Executive Privilege: A Constitutional Myth 167-79 (St. Clair campaign and Jay Treaty).

[3] See Stathis, Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts, 3 J. of Law & Politics 183, 203-05 (1986).

exchange of the early Republic was the "XYZ Affair," in which the French attempted to extort a bribe from American emissaries. The House of Representatives demanded the original diplomatic dispatchs of the American emissaries be provided, and they were -- with the famous substitution of "X, Y, and Z" for the names of the three French participants.[4] This represents the classic model -- not wholesale claims, as in the Thornburgh Memorandum, that Congress cannot require reporting of information, but simply very occasional claims of Executive privilege by the President himself over particular items warranting a claim, which the Congress may then evaluate and accept or reject.

No court has ever yet struck down as unconstitutional a statutory reporting requirement, in the two centuries these have been used.[5] The Justice Department should accept the established law, accept these provisions, and have the President personally claim Executive privilege (for the first time since the scandal involving Anne Burford) if and when some particular item arises where he is prepared to be responsible for such a claim.

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[4] Stathis, supra, at 207.

[5] Department of the Navy v. Egan, 484 U.S. 518, 527 (1988), on which the Thornburgh Response places such reliance, noted the President's power to "control access to information bearing on national security." However, Egan invalidated no law, and called into question no reporting requirement. Congress, with its multitudinous enactments about information control, from the espionage laws to the laws criminalizing the destruction of National Security Council documents, for which the Iran-Contra participants were recently convicted, has ample constitutional power of its own on this subject.

2. Asserted Unconstitutionality of Laws Promoting or Affecting Foreign Affairs Initiatives

The Justice Department Letter of Sept. 9, 1989, had previously challenged as unconstitutional, and the Thornburgh Memorandum further expands that Executive prerogative challenge as unconstitutional, for "provisions purporting to require the President to undertake specific diplomatic negotiations or to prohibit him from entering into particular treaties." Thornburgh Response at 7. This issue has recently arisen in numerous contexts. Perhaps the most visible was the item Attorney General Thornburgh quotes -- President Bush's veto of the joint resolution on the FS-X deal with Japan, by which the President denounced as unconstitutional any requirement that the United States discuss with Japan arrangements to prevent excessive donation to the Japanese of the technology underlying the American aircraft industry. Also among the contexts have been Executive opposition to provisions aimed at preventing the "quid pro quo" arrangements with foreign countries by which the Administration may circumvent the Boland Amendment; Executive opposition to oversight on favorable dealings with terrorist nations and the PLO; Executive opposition to promotion of initiatives that would make Japan open its trade barriers or would ask NATO allies to agree on burden-sharing or would ease trade with Eastern Europe. To all these provisions, the Justice Department has a mechanical answer: "the President's broad and exclusive constitutional authority to control the Nation's diplomatic affairs" and "to determine the form and

content of the Nation's diplomatic initiatives renders them unconstitutional." Thornburgh Memorandum at 7.

In fact, the precedents and practice yield no such mechanical principle by which some overarching Executive authority puts everything touching foreign affairs off-limits to democratic accountability or lawmaking. To analyze claims of such Executive authority, the Supreme Court has restated in Dames & Moore v. Regan, 453 U.S. 654 (1981), the classic test it drew from Justice Jackson's famous concurrence in Youngstown Sheet & Tube Co. v. Sawyer. Dames and Moore examined the sweeping, but dated, dicta in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936), on which the Justice Department now relies, and suggested that it was misleading. 453 U.S. at 661. The Court instead recited that "when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the court can sustain his actions 'only by disabling the Congress from acting upon the subject.'" 453 U.S. at 669 (quoting Youngstown, 343 U.S. at 638 (Jackson, J.)).

Curtiss-Wright, the opinion relied upon the DOJ opinion, has nothing in its holding disapproving laws promoting or affecting foreign policy initiatives. Curtiss-Wright's holding concerned, and rejected, a challenge to Presidential authority to act in obedience to a statute; specifically, it upheld President Roosevelt's enforcement of a 1930's Congressional embargo on arms sales -- a classic example of Congress enacting a policy change in foreign

commerce restrictions and the President correctly carrying it out.[6] Its holding thus gives no support to an Executive claim of exclusive authority.

The precedents repeatedly and squarely reject Executive claims of exclusive authority in this context. Japan Whaling Ass'n v. American Cetacean Society, 106 S. Ct. 2860 (1986), concerned the Packwood Amendment's mandate of certification and sanctions against, inter alia, nations like Japan exceeding whaling quotas. The Supreme Court rejected the Justice Department's suggestions that the President, pursuant to asserted prerogatives, could ignore the Packwood Amendment. "We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field." 106 S. Ct. at 2866 (emphasis added). "The Secretary [of Commerce], of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter." Id. at 2867. Japan Whaling follows a long line of authority establishing Congress's primacy in the area of foreign commerce.[7]

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[6] For Congress's recent discussion of the inaccuracy of expansive claims of Executive prerogative derived from Curtiss-Wright dicta, see Report of The Congressional Committees Investigating the Iran-Contra Affair, H. Rept. No. 433 & S. Rept. No. 216, 100th Cong., 1st Sess. 388-90 (1987).

[7] In Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 & n. 13 (1979), the Court noted that the Constitution gave Congress "'exclusive and absolute' power over foreign commerce" and

The Thornburgh Memorandum simply assumes that provisions requiring the President to move ahead on reducing Japanese trade barriers, and in other areas impermissibly intrude into asserted Executive prerogatives over negotiation. This assumes far too much. The definition of "negotiate" is "to confer with another so as to arrive at the settlement of some matter." Webster's Ninth New Collegiate Dictionary 791 (1985). Provisions like these do not intrude at all into the "negotiations," meaning the conferring and discussing, by the State Department. No Congressional Members participate in the conferring, Congress does not itself appoint the Executive Branch officials who will conduct the negotiations, Congress does not have removal power over such officials, Congress does not structure how they conduct the discussions -- in writing, orally, formally, informally, with or without record-keeping, slowly or quickly, how they respond to counter-proposals, what modifications or priorities they express -- Congress imposes no

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that "[a]lthough the Constitution, Art. I, §8, cl.3 grants Congress power to regulate commerce 'with foreign Nations' and 'among the several states' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be greater." In United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd, 348 U.S. 296 (1955), the court declared void a Presidentially-arranged executive agreement on trade between the United States and Canada as contrary to a statute. "The power to regulate foreign commerce is vested in Congress, not in the executive," id. at 658. "While the President has certain inherent powers under the Constitution such as the power pertaining to his position as Commander in Chief . . . the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress." Id. at 659. "The executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country. . . ." Id. at 660.

penalizing sanctions for failure to complete the negotiations, and Congress creates no channel for communicating with foreign countries other than the familiar "organ" of the State Department. Congress often does not even specify the contents of the proposal, stating only a minimum or goal. In participating in the formulation of an initial proposal, Congress does not intrude into negotiating, but does something quite different.

The classic commentators on the Executive's claimed negotiation prerogatives are MacDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 Yale L.J. 181 (1945). This historic analysis laid the conceptual foundation for the system of statutorily-authorized and statutorily-ratified agreements which has been a mainstay of United States foreign relations since World War II. MacDougal and Lans themselves demolish the theory that everything touching the making of agreements is part of negotiations: "This suggestion that the Congress cannot 'make agreements' involves an unnecessary and a deceptive reification of the total, complex process of 'making' an international agreement." 54 Yale L.J. at 202. They break down the process into distinct parts:

> It is obvious that this total process, even on a minimal breakdown, includes a whole series of activities or steps, such as
>
> > (a) the formulation of the policies that are to guide the conduct of negotiations;
> > (b) the conduct of negotiations and the concluding of an agreement in accordance with the established policies;

> (c) the validation or approval of the agreement by the appropriate constitutional authority for making it the law of the land, and
> (d) the final utterance or ratification of the agreement, when required, as an international obligation of the United States.

54 Yale L.J. at 202 (footnotes omitted).

MacDougal and Lans apply their extensive scholarship to distinguishing between the two steps claimed usually to the President -- "(b) the conduct of negotiations," and "(d) the final utterance . . . of the agreement," -- and the other two steps in which Congress has so large a role -- "(a) the formulation of the policies that are to guide the conduct of negotiations," and "(c) the validation or approval of the agreement."

Thus, as to the formulation of the policies that are to guide the conduct of negotiations, MacDougal and Lans explain that while "The President has become the sole mouthpiece of the nation in communication with foreign sovereignties," it "is completely unnecessary to conclude from this, however, that the Congress has no power to participate in the framing of policies to guide the conduct of negotiations. . . ." Id. at 203. Quite the contrary, "[t]he fact is, of course, that under our Constitution, as interpreted since the beginning of the Government, the power to formulate policies for the guidance of international negotiations . . . are thoroughly divided among the President, the President and the Senate, and the whole Congress." Id.

As MacDougal and Lans recognize, one of Congress's powers, such as concerning foreign commerce, provides one of the prime contexts for recognizing the legitimate Congressional role in advance of the conduct of negotiations:

> Constitutional powers such as 'to regulate foreign commerce' . . . must, therefore, if they are to be powers that include control over their subject matters and not mere nominal investitures of ceremonial attributes, include the power to shape the policy that is to control agreements made with other governments with respect to such subject matters. The power to regulate foreign commerce, for example, is most futile if it does not include the power to authorize the making of agreements indispensable to effecting the regulation desired.

Id. at 219.

Nor is there any special barrier to provisions that (affirmatively) promote foreign affairs initiatives, as distinct from those which (negatively) deny authorization. The Supreme Court commented on a conceptually similar situation when Congress, to promote energy conservation, required that state utility commissions put utility rate reform proposals on their agenda. The Court upheld this statute, finding it "should not be invalid simply because . . . Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards. While the condition here is affirmative in nature -- that is, it directs the States to entertain proposals -- nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one." FERC v. Mississippi, 456 U.S. 742, 765 (1982) (emphasis in original). FERC v. Mississippi points that logically, the key

question is whether Congress formulates policy in a context. If so, then whether the policy being formulated requires only refraining from action, or what FERC v. Mississippi calls something "affirmative in nature," is, to the Supreme Court, a distinction that does not render an Act of Congress "constitutionally improper."

If any question be raised as to whether the Framers intended Congress to legislate as it has, an examination of the original intent provides a clear answer. On the eve of the Constitutional Convention, the Secretary for Foreign Affairs, John Jay -- in many respects the forerunner of the eventual position of Secretary of State -- had engaged in negotiating a major agreement with Spain regarding trade, Mississippi navigation, and territorial claims. Bester, Separation of Powers in the Domain of Foreign Affairs: The Intent of The Constitution Historically Examined, 5 Seton Hall L. Rev. 527, 614 (1974). Jay infuriated numerous states during the process of formulating policy for the agreement, when he came before "a full meeting of the entire Congress [of the Confederation] . . . on the 3rd of August 1786, expatiating on the advantages of a commercial treaty with Spain and proposing, as the price to be paid, that the United States should agree to 'forbear' navigation of the Mississippi during the 25 or 30-year life of the treaty." Id.

The many states whose foreign commerce would have been ruined by that proposal remained in such shock the following year at the Federal Convention of 1787 that they insisted on the Constitution

involving Congress in formulating policy at the proposal stage, not just awaiting whatever policy the Executive chose and passively accepting or rejecting it. "Had there been any disposition to transfer to the executive branch the authority to determine the main lines of foreign policy and to leave to a legislative body merely the power to approve or reject a treaty once made, such an arrangement was rendered quite unthinkable by the events of 1786." Id. at 619.

The Framers expressed their expectations about Congress's role in policy formulation regarding the other key type of agreement besides commercial agreements, namely, agreements establishing peace and ending war. If Congress did not take part in formulating peace-agreement policy, the Framers feared the President would monopolize the power of achieving peace and, hence, force the nation into continuing wars. After all, the country had recently endured the Revolutionary War and its lengthy period of negotiating a settlement, as well as a history of colonial-era royally-made wars that had inflicted heavy costs on the colonies. Accordingly, the Constitutional Convention repeatedly denounced any such prospect of Presidential monopoly on peace agreement policymaking. As a leading historian recounts the Convention's debates:

> Four delegates in all addressed themselves to this specific point in the debate of the 1st of June, and every one of them emphatically rejected, as Pinckney did, the idea of including the power of peace and war in any constitutional definition of executive power. James Wilson of Pennsylvania, a future member of the Supreme Court

> did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.
>
> Looking beyond English precedents to the political theorists of the Continent, Wilson asserted that "[m]aking peace and war are generally determined by Writers on the Laws of Nations to be legislative powers." James Madison of Virginia agreed with Wilson, explaining that 'executive powers ex vi termini, do not include the Rights of war & peace &c.' John Rutledge, a colleague of Pinckney's from South Carolina, 'was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace.' Not a single delegate spoke to the opposite effect.

Bester, supra, at 575-76 (quotations from Convention debates omitted). These Framers would be surprised at the Executive claim of absolute prerogatives over the formulation of agreement-making policy.

CONCLUSION

The Thornburgh Response represents a dangerous and unwarranted claim of Executive prerogative to deny Congress information and block it from enacting laws. In light of the clear history and judicial precedent supporting Congress, this claim is without merit.

Mr. BROOKS. Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

Mr. Ross, your testimony is to the effect that congressional investigations and oversight may include the production of sensitive litigation strategy documents, and my concern is, what is relevant to our investigation of the Department's procurement practices?

The committee's investigative staff already has conducted numerous interviews and enjoyed almost unlimited access to Department of Justice documents—I understand, hundreds of thousands of pages. Since the investigation relates to the Department of Justice's ADP procurement practices and not to the Department of Justice's litigation practices, why is it necessary for the committee to see documents primarily dealing with litigation strategy that would not be available to a party in the various legal proceedings?

Mr. Ross. Well, let me answer that question starting from the tail end. If the committee has a need to see documents, then the fact that a party in litigation would not have access to the documents should not preclude the committee from having access to it.

Moving to the middle part in terms of what is the proper scope of the committee's inquiry, this committee, more so than any other committee, would be well within its jurisdiction to have as a topic of its inquiry the litigation practices of the Department of Justice. If this committee does not provide oversight over how the Department of Justice litigates matters, then no one provides that oversight and the Department of Justice goes forward as an unchecked force of governmental authority.

With regard to whether or not these particular documents are relevant to the committee's inquiry into matters that are properly within the committee's jurisdiction, that is a question that I cannot answer as a legal matter but is one that is related to the specifics of the documents and the committee's inquiry, which is a question that would be better put to the committee's investigators; we are here to comment on the legal analysis.

Mr. FISH. I understand that, and I appreciated your thoroughness and scholarship very much.

So the question is, whether the committee has a need for these documents. Hopefully, we will find out when we have the occasion for a closed door briefing from the investigators to learn whether they feel that they have received an adequate response to every relevant request or whether they feel there is a need for more of the material than currently the Department is willing to produce.

Mr. Ross, there is no question—you and I don't part company on this—about the legislative power to determine whether procurement practices are wasteful, mismanaged, or fraudulent, and I can only imagine that the documents relevant to these practices have been provided. So my question is: How do documents dealing with litigation strategy relate to this legitimate oversight function? Couldn't we fulfill our responsibility without these types of documents?

Mr. Ross. Again, you are asking me to define what is the actual scope of the committee's inquiry and what is the proper scope of the committee's inquiry.

Mr. FISH. That is correct.

Mr. Ross. The proper scope of the committee's inquiry could certainly include the Department's litigative practices. Whether or not the committee wants to do that is a matter solely for the determination of the committee and not for the determination of the Department of Justice.

I am not in a position to advise you whether the committee should be looking into the Department's actions in the case or not, but I can advise you that the committee has the authority to look into those matters if it so chooses.

Mr. FISH. But you do say in your written submission, "[I]t is past the stage of consideration in an evidence-hearing district or bankruptcy court, and the evidence-taking record has been closed." Page 16. Now I understand, however, that further evidentiary proceedings are anticipated in the Bankruptcy Court. Certain proceedings, as we know, have been stayed, but presumably will not be stayed indefinitely.

Now, assuming the accuracy of our information relating to further evidence gathering in the Bankruptcy Court, doesn't this undermine your argument?

Mr. Ross. I don't believe so at all. The Department's argument or position suffers from a number of weaknesses. One of those weaknesses is the status of the case, and we draw the analogy to rules regarding access to grand jury information where oftentimes committees of the Congress are given material after a grand jury has concluded its work that committees decline to seek during the time that the grand jury is sitting even when there may be later developments in the case.

One of the questions that Congress has to ask itself in the whole area of pending actions, be they litigation actions or administrative actions, is, how long should Congress wait? If you have a situation where there is a potential or perceived national problem, in this day and age problems are addressed in any number of forums. There may be an administrative agency action, rulemaking or adjudicatory, which is pending; there may be litigation, private or brought by a government, that is pending; there may be legislation which is under consideration. It is for the Congress to determine whether it wants to put itself in the preeminent position of gathering the material and acting within its sphere.

Mr. FISH. I understand that. I am talking about the cost and the question of fairness to the litigants by the Congress exercising its extraordinary power, because there is an administrative proceeding also in progress. Proceedings before a Board of Contract Appeals are in a pretrial stage; discovery is now under way; and, as you know, while this is an administrative proceeding, the board can award damages; its findings are then appealable to a Federal court. We are brought right back to the same question of the possibility that litigation strategy documents could either influence the damage award or prejudice the Government's case.

Mr. Ross. And the potential cost and fairness to a litigant, be it a civil litigant or a criminal defendant, that may be visited upon the process by a congressional investigation is a matter that the committees of Congress have to continually take into account and is the reason why committees at times defer matters, at times treat documents or information in a particular fashion; but those are a

determination that you as an elected representative have the duty and the obligation to make, keeping in mind both fairness to the particular litigant and fairness and obligation to the Nation as a whole.

Were the Congress to forswear taking action in any area until all litigation, all potential litigation, or administrative action, or all appeals from administrative action had run their full course, you would find yourself only looking at problems that had beset the Nation a decade or two ago.

Mr. FISH. Just a minute. I was there, and I started out talking about the span of time to which the allegations are directed, and those documents presumably have been produced. What we are talking about now are matters that are quite different, that go to just the attorney-client privilege and litigation strategy on paper, not the core of whether or not a conspiracy existed and whether damage was done to the plaintiff.

But I want to thank you very much. I really was looking forward to this, and you certainly performed as I hoped you would, and it has been very challenging and a lot of fun having you here this morning.

Mr. ROSS. Let me conclude by saying that the interest that you identify in terms of fairness to litigants is certainly a valid interest and one that committees should and do take into account. My role here, again, is not to tell you how to exercise your discretion and authority but, rather, an attempt to describe for you the reach and extent of that discretion and authority. It is, of course, up to the elected Members of Congress to determine how that authority should be exercised.

Mr. FISH. Thank you, Mr. Chairman.

Mr. BROOKS. Mr. Synar, the gentleman from Oklahoma.

Mr. SYNAR. Thank you, Mr. Chairman. Just a few questions, if I could.

Mr. Ross, do you disagree with the following statements that the committee, and not the Justice Department, should determine the scope of its inquiry?

Mr. ROSS. Not only do I agree that it is the committee that should determine the scope, but I think I said something close to that in my testimony.

Mr. SYNAR. Second, do you agree or disagree with the statement that release of information to Congress is not equal to publication of that information?

Mr. ROSS. That is clearly the case and has been so held by any number of court decisions.

Mr. SYNAR. And, finally, would you agree that the compelling interest of a congressional probe into accusations of fraud and abuse outweighs any interest of withholding documents?

Mr. ROSS. That would be a determination that the committee would have to make, but, clearly, among the most important functions of the Congress is the ferreting out of waste, fraud, and abuse within the executive agencies, and there is perhaps no agency in which that is more important than with respect to the Department of Justice, which has invested in it the enormous power of being the Nation's prosecutor and litigator and thus has enormous power over the citizens of this Nation.

Mr. SYNAR. As you know, I was involved with your office with respect to another case involving Rockwell International and the Rocky Flats facility and the withholding of information, and this case is strikingly similar to the refusal that the subcommittee I chair received in our investigation. Do you believe there is any distinction between an investigation of the Justice Department itself and an investigation of another agency with respect to its claim to withhold documents?

Mr. Ross. Each claim of seeking to deny committees access to documents has to be weighed by the committees.

Mr. SYNAR. But the status of the Justice Department versus another agency doesn't make that distinction—correct?

Mr. Ross. No. There are matters within the Department of Justice that rise to a certain level, other matters that don't. There are matters within the Defense Department that rise to a certain level and other matters that don't.

Mr. SYNAR. OK. Is there a distinction between the privilege claimed for the underlying case being investigated whether it is a civil case or a criminal case?

Mr. Ross. Only in terms of what weight the committee might want to give to the claim. As a legal matter, no. The court has held that the pendency of a criminal investigation or prosecution does not divest the Congress of its investigatory authority.

Mr. SYNAR. All right. Is there a distinction between documents being requested that are in control of Justice but relate to another agency's actions or documents that relate directly to the Justice's own performance?

Mr. Ross. I would think that the Department of Justice's claims that appear like attorney-client claims would be viewed with a degree more skepticism when they are, in essence, representing themselves and claiming to be both the attorney and the client than in a situation where they have established something that looks more like an attorney-client relationship with another agency, but, again, that does not mean that in either instance the claim is valid, but it does raise a certain level of skepticism.

Mr. SYNAR. If you will recall, in response to a request for certain material we had in the *Rockwell* case, the Justice Department refused on the basis that the material reflected "deliberative process of the agency," and that appears to be the same as "predecisional" in the matter now before us. Can you explain how any materials would not fall under those two categories if we accepted those definitions, Mr. Tiefer?

Mr. TIEFER. Congressman Synar, as you know, I worked with your subcommittee on that, and eventually, due to considerable efforts by your subcommittee, you obtained documents of the highest sensitivity, even concerning criminal strategy, and so it was quite a demonstration that, although the Department of Justice might initially start out claiming, in the end it ceases claiming and must surrender the documents.

But as for your particular question, once the Justice Department asserts the broad claim that anything concerning its deliberative processes can be withheld, that would appear to cover almost anything that they would want to withhold.

Mr. SYNAR. In your best judgment, Mr. Tiefer, is there any legal authority for the Justice Department to withhold materials because they are deliberative or predecisional?

Mr. TIEFER. As far as withholding materials from Congress on those grounds, once the Supreme Court stated in *McGrain* and in *Sinclair* that the congressional committees have a full interest that cannot be obstructed in investigating the Justice Department, then the Justice Department no longer has a basis. Those Supreme Court cases have not been overruled, and they govern.

Mr. Ross. If I might add to that.

Mr. SYNAR. Sure, Mr. Ross.

Mr. Ross. What the Department and agencies from time to time seem to be doing is to try to impose upon the exchange of information flowing from the executive branch to the oversight committees of Congress the same strictures that are applied in the statutory scheme known as the Freedom of Information Act, which was enacted by the Congress in order to give the public certain access to information.

The notion that exemptions from mandated disclosure that were enacted by the Congress in the Freedom of Information Act should be utilized to preclude congressional access are simply absurd. The legislative history of the Freedom of Information Act rejects that contention, the very language of the statute rejects that contention, and the cases discussing the Freedom of Information Act reject that contention. It simply flies in the face of all precedent and of common sense to seek to borrow from the Freedom of Information Act certain exemptions that were extended to decisional process documents and seek to use that as a shield against congressional scrutiny.

Mr. SYNAR. Thank you, Mr. Chairman, and I do appreciate it, and I want to commend you for this important hearing, and I cannot stress enough the importance of this in behalf of not only this particular subcommittee but any subcommittee that does oversight but, more importantly, in this branch of government's equal legal status in this Government, and these types of pieces of information and documentation have to be secured by this branch of government if we are going to complete the task that we have the constitutional responsibility to do.

Mr. BROOKS. Mr. Campbell, the gentleman from California, any comments?

Mr. CAMPBELL. Yes, Mr. Chairman. Thank you.

It seems to me we have several different privileges being asserted or potentially asserted. I have seen in the documents reference to litigation strategy, work product, attorney-client, and executive privilege. The latter, though, I guess, came out more in our testimony today, and I view those are very different, different in the context of where the Congress' authority would triumph over the individual privilege, although in each case, it seems to me, there is a balance.

That is my position, and I would like to address a question to you, Mr. Ross, with this in mind. You recall, if you were here, my conversation with Ambassador Richardson. If not, let me try to summarize. What I was trying to say was that, whereas one can assert a privilege, it will fall relative to a congressional interest in

several instances. The Supreme Court told us that in several cases you have cited and also in *United States* v. *Nixon.*

That is, however, not to say that the privilege does not exist or that because we are dealing here with Congress rather than with a court the privilege does not exist, that, rather, it is a balance, and without judging how the outcome of that balance would be, my guess would be that each one of these four—work product, litigation strategy, executive privilege, and attorney-client, and, frankly, the first two probably are the same—would be subject to the balance. That is to say, Congress has a right, there is a privilege which applies even in a congressional hearing, and then it shall be determined which one triumphs.

That is my position, and I wonder if you could comment on it.

Mr. Ross. Let me adopt your characterization of there being three separate categories. I think their litigation strategy claim really is simply another way of stating the work product doctrine, and so we have three separate types of claims—work product, a more specific attorney-client, and the executive privilege.

I might disagree with your formulation of a so-called balancing test, but I think my disagreement is perhaps more one of semantics than of practicality, because in my analysis and, I think, the analysis that has been adopted both by the courts and by the Congress, that certainly for the first two categories—the work product and attorney-client—that balance comes in not in describing the committee's legal authority to obtain access to the information but in the committee's determination as to whether or not it should either seek to exercise that authority and how it should treat the information once it receives it, and I will come back to those two doctrines in a moment.

With respect to executive privilege, there is some question with regard to whether executive privilege applies at all vis-a-vis congressional inquiries, and obviously you are familiar with the writings of Burger in terms of the myth of executive privilege.

If we look for the best discussion by the Supreme Court, it would be in the *United States* v. *Nixon* case, which was not discussing congressional access. What the Court said in Nixon is that there may, indeed, be, and the Court would so hold that there was, a constitutionally derived privilege for executive and personal presidential deliberations, notwithstanding that it did not appear in the text of the Constitution such as your future debate privilege which does appear in the text of the Constitution—that that nontextual but constitutionally-based executive privilege is one that can be overcome when another branch of government has a need in the fulfillment of its constitutional functions.

Mr. CAMPBELL. Would you mind if I interrupted just there, because in *United States* v. *Nixon,* as I recall, the Chief Justice held for the unanimous Court that the judicial branch explicitly could triumph over the executive but that the Court reserved on whether Congress could, so that I think you may be a touch too generous in your accurate but still generous characterization that the Court said another branch. The Court said the judiciary and, quite clearly, as I recall, in a footnote said they didn't reach the question as to whether Congress could triumph.

If you would care to respond to that, I would be interested.

Mr. Ross. As I indicated, the specific case before the Court in *United States* v. *Nixon* was one of judicial access.

Mr. CAMPBELL. But do you grant my characterization of the case that the Court did not rule and, indeed, explicitly by that statement suggested that there may possibly be a difference when it is the judiciary versus the executive and when it is the Congress versus the executive?

Mr. Ross. I will agree with you, as I said, that the holding in the case was with regard to judicial access. I think that the case serves as persuasive authority and, in fact, served as such persuasive authority in the impeachment inquiry for getting access to those documents.

Mr. CAMPBELL. Do you recall the dicta to which I just referred? And I grant it is dicta, not a holding.

Mr. Ross. Yes.

Mr. CAMPBELL. Thank you.

My question that I began with I would like to redirect you to try to respond to. Let's now deal with attorney-client. I understand the Department is asserting attorney-client as to some of these documents. Again, we don't have the final word as to which ones have which privilege asserted to them. You seem to suggest that that would not be at all a problem if we chose to exercise our subpoena authority to obtain those documents. I disagree. I believe that there is a fairly good claim for constitutional underpinning to attorney-client, certainly in criminal matters, and I think that is, in all likelihood, what we will be talking about here. So I would invite your response to that—namely, that it is not out of the balance simply because it is not executive privilege. I took your answer to say: executive privilege, you balance; attorney-client/work product, you don't; Congress wins; it is just a question of good judgment; and I respectfully disagree with you as to attorney-client, making the point relative to the constitutional underpinnings.

Mr. Ross. OK. If I might discuss the history of attorney-client claims before the Congress. In 1857, when the Congress and the House had before it the statute that now appears as 2 U.S.C. 192 and 194, the contempt of Congress statutes, one of the questions that was debated on the Floor of the House was whether or not a claim of attorney-client privilege would excuse somebody from furnishing testimony to the Congress or to a congressional committee.

In 1857, at the end of that rather explicit debate, which was, people took forceful positions on both sides of the question, the determination was made, first in the House and then in the Senate and jointly by the Congress, that attorney-client privilege would not bar access by Congress to information and therefore no statutory exemption in the statute that becomes 192 and 194 was adopted.

Throughout history there have been——

Mr. CAMPBELL. I am going to interrupt you then again, if I may. You are citing congressional authority for the proposition that Congress has authority. Did that 1857 case go to litigation?

Mr. Ross. The 1857 instance that I was citing was in the drafting of the contempt statute but included, as I said, a fully fleshed out debate on the question, and that incorporated the English history that served as the basis from which the American attorney-client privilege has derived.

The Congress in that instance in the mid-1800's and throughout a number of other instances has endorsed the position that attorney-client privilege does not apply. There is not a clear judicial ruling.

Mr. CAMPBELL. Thank you. That was my question.

Mr. ROSS. I thought it might be.

Mr. CAMPBELL. I have no doubt that Congress says it has the power. The issue is, do you have a case in point, which I would be delighted to read, saying that the Congress' assertion trumps the attorney-client privilege? And I take it you do not.

I would be happy to welcome a letter. I see Mr. Tiefer looking through his documents.

Mr. ROSS. The fullest discussion would be in the proceedings regarding the Bernstein brothers, who were recalcitrant witnesses before the Foreign Affairs Committee on the Marcos matter.

Mr. CAMPBELL. Do you have a case to cite me?

Mr. ROSS. As I said, there is no case that fully answers the question. There are cases that walk up to the edge of it and discuss it.

Mr. CAMPBELL. Well, perhaps this will be the case where we step over the edge, but I appreciate your candor in answering me that there is no case holding the proposition that the attorney-client privilege is overcome by the congressional assertion of its own authority.

Mr. ROSS. I would be remiss if I did not further add, in terms of your question, both on the questions of the constitutional aspect of attorney-client privileges, as you indicated, which normally comes up in the criminal context, courts and commentators that have discussed that normally do so in the case of a claim of attorney-client privilege by a criminal defendant and make it a concomitant part of one's right to counsel. I don't think it would be fair to import the constitutional dimensions of attorney-client to the Department of Justice unless we are in a situation where the Department of Justice is to be viewed as the criminal defendant.

Mr. CAMPBELL. There is another basis for your consideration and perhaps at a later time, and that is the common law right to trial as well. So there are two constitutional bases. However, as I indicated before, we may very well find ourselves in a criminal proceeding.

I conclude with one last point, and that is, from your experience relative to representing the interests of the House and enforcing subpoenas of this sort, I would like your comment on what I would perceive to be the correct way of proceeding here. So I am going to give you what I think is the correct way of proceeding and then ask your response. That is to say, we should hear at least from the Department of Justice before this committee to know what assertion they are making relative to what documents—as a member of this subcommittee, I have not heard from the Department of Justice; that we should review what is already available from sources as to which no privilege is asserted in committee; that we should offer in camera review, if appropriate, for any documents as to which there is sensitivity; that we identify as to which ones executive privilege is being asserted, as opposed to work product and attorney-client; and, lastly, as my colleague, Mr. Fish, indicated, we identify whether the scope of our investigation is the INSLAW al-

leged fraud or overbearing, fraudulent, or otherwise illegal behavior in the conduct of litigation, for if it is the latter, our expansive authority is at its greater; if it is, however, the former, it is limited.

That would be my approach to proceeding. Do you believe that is an incorrect approach?

Mr. ROSS. Let me defer on putting thumbs up or thumbs down to any particular approach.

As I've answered to several questions before, my role is to describe for you the reach of your authority. As to how that authority should be implemented, that is a matter for the committee and the members of the committee to decide. Clearly, efforts should be made, as they have throughout the history of dealings between the executive branch and Congress, to accommodate any true and valid concern of the executive branch with regard to confidentiality of information. How those efforts are to be made, and if they are valid in this instance, are questions for people who have a better grasp than I do of the underlying aspects of this particular investigation.

Mr. CAMPBELL. Thank you, Mr. Chairman.

Mr. BROOKS. Thank you, Mr. Ross, and Mr. Tiefer, Mr. Long. We appreciate you're being here. Are there further comments you wanted to make?

Mr. ROSS. At the risk of overstaying my welcome, if I might just add one comment with regard to Mr. Campbell's question, and that is, in terms of describing the claim as attorney-client privilege.

One of the troublesome aspects of that claim is the notion that this committee and the Congress does not share access to information with the executive branch when litigation is being conducted on behalf of the Government. I know the chairman objects to the description of the committee as being part of the client base, but I think that in certain respects, for attorney-client privilege analysis, that when people are operating as attorneys on behalf of the Government, their duty to report would run not only to the specific supervising executive branch authority that cuts their check but to the Government as a whole.

The chairman had asked about the D.C. bar's rules which seem to draw a distinction between any one particular agency and another. I find it hard to believe that an attorney at the Department of Justice, who was asked by the President of the United States to share with him a memo regarding a particular piece of litigation, would think that it was appropriate to say, "No, Mr. President, I'm not going to tell you what my litigation strategy is because that would violate my attorney-client privilege."

The point is that, in that instance, the President is every bit as much the client as Mr. Thornburgh might be, and I think the same analysis could hold true that the Congress has every bit as much right to information with regard to litigation being conducted on behalf of the Government. The Congress is part of the Government.

Mr. BROOKS. Thank you very much.

Our final witness this morning is our long-time friend, Milton J. Socolar, Special Assistant to the Comptroller General of the GAO. Although Mr. Socolar has appeared before me many, many times as an expert witness, this is his first appearance before in the Judiciary Committee. This morning he will give us the highlights and

conclusions of GAO's recent report entitled "Problems Persist in Justice's ADP Management and Operations."

I might add that GAO's work at the Justice Department has been exemplary and I fully expect to be using more of their audit and investigative services in the future.

Milt, it is always good to see you again. Your prepared statement will be made a part of the record. I wish you would outline the salient features of it for the committee.

STATEMENT OF MILTON J. SOCOLAR, SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY HOWARD RHILE, DIRECTOR, GENERAL GOVERNMENT INFORMATION SYSTEMS

Mr. SOCOLAR. Thank you, Mr. Chairman. It's a pleasure, too, for me to be here to discuss the results of our recent review, undertaken at your request, of the Department of Justice's Automated Data Processing management and operations.

You were interested when you asked us to review the Justice Department ADP management in whether the Justice Information Resources Management office is structured in accordance with the Paperwork Reduction Act of 1980, and whether the IRM office has sufficient authority and resources to fulfill its responsibilities under the Brooks Act and the Paperwork Reduction Act, and whether Justice has sufficient resources to properly conduct large-scale ADP and telecommunications acquisitions.

Our findings can be stated rather concisely. I would summarize them by saying simply that the Department has spent some 12 years trying to put together a case management system and has still not been successful. But apart from its case management system, the Department has broader problems. The Department has no plans for its overall ADP operations that are consistent with the Paperwork Reduction Act or with its need to consolidate its ADP operations. The chief information officer lacks clear authority. The Department itself makes the point that it lacks sufficient staff to properly organize its ADP operations.

We're not talking about small operations. Over the past 5 years and into the next 5 years, the Department will be spending about $5 billion, and the major components of the Department, the Immigration and Naturalization Service, the FBI, who are the biggest spenders of that $5 billion, are components that have some of the biggest problems.

We have discovered that the Department suffers from a lack of good security oversight. There is a lot of sensitive data within the Department of Justice computer files that is not secure. In the Immigration and Naturalization Service we have a situation where its ADP system does not adequately protect against admitting aliens inappropriately. They have not been able to get their fee collection operations adequately functioning. The kind of sensitive data that is within Department files would include such items as the names of informants, undercover agents. There is a lack of physical control over the assets. There is simply a loose collection of automated information systems that provide incomplete and inaccurate data.

Systems are redundant. There's a whole host of problems within the Department.

The main things I would say that contribute are two. One is this lack of an overall plan. The Department does not have a good sense of what information it needs to adequately carry out its mission and, of course, the lack of adequate staff to carry out these functions.

I would be glad to answer any questions that you may have.

[Mr. Socolar's prepared statement follows:]

STATEMENT OF MILTON J. SOCOLAR
SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL
UNITED STATES GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Judiciary Committee:

We are pleased to be here today to discuss the results of our recent review, undertaken at your request, of the Department of Justice's ADP (automated data processing) management and operations. You asked if Justice has adequately responded to our previous recommendations on ADP management and case management. You also asked (1) whether the Justice information resources management (IRM) office is structured in accordance with the Paperwork Reduction Act of 1980; (2) whether the IRM office has sufficient authority and resources to fulfill its responsibilities under both the Brooks Act and the Paperwork Reduction Act; and (3) whether Justice has sufficient resources to properly conduct large-scale ADP and telecommunications acquisitions.

Our review disclosed that some longstanding problems still exist. It is difficult to understand the department's lack of progress in responding to our 1983 recommendation to develop accurate and complete information on its litigative cases; an effort that affects only the department's case management systems. However, of broader concern are the more fundamental problems with Justice's overall management of its information resources -- problems that can affect all of the department's systems.

In this regard, Justice has not yet implemented our 1986 recommendation to develop an information resources management plan. Organization problems also weaken management of information resources. Although its central IRM office is structured in accordance with the Paperwork Reduction Act of 1980, the senior IRM official does not have clear authority to direct the component agencies to accomplish Justice-wide ADP goals and objectives. In addition, Justice does not believe it has sufficient staff with adequate technical and managerial capabilities, at both the department and component levels, to conduct large-scale ADP acquisitions and required oversight.

These kinds of problems raise doubts as to Justice's ability to effectively manage its information technology resources, especially since Justice plans to spend over $2.7 billion for information technology and services in fiscal years 1991 through 1995. In this regard, two of the biggest spenders of this money--the INS (Immigration and Naturalization Service), and the FBI (Federal Bureau of Investigation)--account for over 55 percent of this amount, and seem to have the biggest problems. For example, our recent reports on the department's ADP security program[1] and INS' information management[2] showed that the department risks

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[1] Justice Automation: Tighter Computer Security Needed (GAO/IMTEC-90-69, Jul. 30, 1990).

[2] Information Management: Immigration and Naturalization Service Lacks Ready Access to Essential Data (GAO/IMTEC-90-75, Sept. 27, 1990).

disclosing sensitive computer data because of poor security while INS risks admitting illegal aliens and granting benefits to ineligible aliens, and has millions of dollars in uncollected debts because of unreliable ADP systems. Also, a recent report by the department's Office of the Inspector General[3] pointed out that the FBI had "major internal control weaknesses" involving almost all aspects of its ADP operations, including findings that the FBI's IRM program is fragmented and ineffective.

Mr. Chairman, I would like to briefly summarize the results of our work and have our full report placed in the record of this hearing.[4]

JUSTICE HAS NOT ADEQUATELY RESPONDED TO PAST GAO RECOMMENDATIONS

Since 1979 we have issued a number of reports addressing Justice's ADP management and operations. These reports made recommendations to improve the department's ability to provide complete and reliable litigative caseload information and to develop and implement an IRM plan. Justice has not fully responded to these recommendations.

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[3]Audit Report: The Federal Bureau of Investigation's Automatic Data Processing General Controls, September, 1990.

[4]Information Resources: Problems Persist in Justice's ADP Management and Operations (GAO/IMTEC-91-4, Nov. 6, 1990).

Litigative Caseload Information Still Unreliable and Incomplete

After a number of false starts and over a decade of effort, Justice still does not have a system that can accurately provide the total number of cases being litigated and the total number of staff in the litigating organizations working on them.[5] Efforts to develop such a system have been unsuccessful because each litigating organization was allowed to develop a separate system to satisfy its own management needs and because data submissions from the litigating organizations that fed the departmental system were incomplete and unreliable.

Over 11 years ago we reported that the Congress and the Office of Management and Budget (OMB) found it difficult to evaluate Justice requests for additional resources because of a lack of information on its litigative caseloads.[6]

In 1983 we reported that the case management system with its incomplete and inaccurate information did not meet the needs of either Justice or the Congress.[7] At that time we recommended that

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[5]Justice's litigating organizations include six divisions--Antitrust, Civil, Civil Rights, Criminal, Lands and Natural Resources, and Tax--and the Executive Office for U.S. Attorneys.

[6]Department of Justice Making Efforts to Improve Litigative Management Information Systems (GAO/GGD-79-80, Sept. 4, 1979).

[7]Department of Justice Case Management Information System Does Not Meet Departmental or Congressional Needs (GAO/GGD-83-50, Mar. 25, 1983).

the Attorney General develop a rigorous data-management program to achieve uniform, accurate, complete case-management information.

Three years later, in 1986, we again reported that despite actions to improve data quality, Justice still needed to address fundamental data-integrity problems.[8]

At present, although Justice has rectified some of its data problems, significant problems remain. According to its senior IRM official, no one within Justice uses the departmentwide case-management system because of its continuing inaccuracy. The main problem with the current system is the lack of a uniform case-numbering system among the litigating divisions and U.S. Attorney offices resulting in multiple counting of cases that are shared or transferred among these litigating organizations. It is not clear why the department would find it extraordinarily difficult to correct this problem.

In August 1990 Justice entered into an agreement with the General Services Administration's Federal Systems Integration and Management Center to perform a consolidated requirements analysis, and is exploring the feasibility of a single case-management system.

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[8]Justice Department: Improved Management Processes Would Enhance Justice's Operations (GAO/GGD-86-12, Mar. 14, 1986).

IRM Plan Still Lacking

In our 1986 report we also recommended that the Attorney General develop a plan for managing the department's information resources.[9] We reported that Justice needed a plan to assess whether its component ADP initiatives were supporting departmentwide mission goals and objectives. In response, Justice developed a strategic automated information systems plan. Although the plan identifies cross-cutting information technology issues, the plan is not clear on how Justice will use information resources to accomplish its mission. Justice expects to develop an overall IRM plan by July 1991.

SENIOR IRM OFFICIAL DOES NOT HAVE CLEAR AUTHORITY

Under the Paperwork Reduction Act of 1980, federal agencies are assigned various information management responsibilities, such as implementing governmentwide and agency policies, principles, and standards. By departmental order, the information management requirements of the act have been assigned to the Justice Department's senior IRM official, the Assistant Attorney General for Administration.[10] Department regulations also give this official broad responsibilities that include IRM functions such as

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[9]GAO/GGD-86-12, Mar. 14, 1986.

[10]Department of Justice Order 2880.1, "Information Resources Management Program," June 26, 1987.

formulating department policies, standards, and procedures for information systems.[11] Although the senior IRM official has these broad responsibilities, Justice's departmental orders and regulations do not give the senior official clear authority to direct component organizations to implement departmental IRM decisions. This lack of clear authority may have impeded the senior IRM official from fully carrying out his assigned responsibilities. In our judgement clear authority is important because of the varying degrees of independence of Justice's component organizations. For example, while we are not certain that this lack of clear authority prevented the senior IRM official from developing and implementing a uniform case numbering system, we noted that the manager of this project expressed such concern and the senior official recently asked the Attorney General for help in gaining the cooperation of the litigating components in developing such a system.

JUSTICE BELIEVES ITS IRM RESOURCES AND TECHNICAL AND MANAGEMENT CAPABILITIES ARE LIMITED

Justice believes that it does not have sufficient technical and managerial capabilities to administer its large ADP budget including the monitoring of information technology contracts, conducting large-scale ADP acquisitions, and providing the necessary management oversight of its information resources. The

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[11]28 C.F.R. 0.75.

senior IRM officials at both Justice and the Immigration and Naturalization Service have expressed this concern. And the issue has been raised in department reports.

The department's central IRM office says that limited resources have prevented it from fulfilling its oversight responsibilities. For example, staff shortages have precluded independent oversight and evaluation of IRM functions such as computer security including proper training of staff.[12] The result has been the proliferation of many disturbing security weaknesses in the department's sensitive computer systems.

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In summary, Mr. Chairman, Justice must take decisive action to solve its longstanding information management problems. This need is made more urgent by department plans to acquire $2.7 billion in hardware, software, and computer services in the next 5 years. Our report contains recommendations for addressing these problems. In particular, we recommend that the Attorney General (1) require that the department develop an IRM plan and clean up its case-management systems to provide uniform, accurate, and complete information; (2) clarify the senior IRM official's authority in implementing departmental IRM decisions; and (3) augment, where needed, central IRM office capabilities.

Mr. Chairman, this concludes my prepared statement. I will be happy to respond to any questions at this time.

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[12]GAO/IMTEC-90-69, July 30, 1990.

Mr. BROOKS. Mr. Socolar, Justice plans to acquire $2.7 billion worth of ADP hardware, software and services in fiscal 1991 through 1995. Is there any indication that Justice will have the necessary management, technical competence, to successfully conduct and monitor these acquisitions?

Mr. SOCOLAR. From our review, I would not be too optimistic. Justice's senior IRM office has expressed concerns that the Department lacks sufficient qualified staff to ensure that it is spending its IRM funds efficiently and effectively. I would not be optimistic.

Mr. BROOKS. We will, without objection, we will include in the record a recent GSA report on Justice's ADP management and the Department's response to that report.

[See app. 2.]

What impact has the Department's ADP management problems had on various Justice programs and initiatives?

Mr. SOCOLAR. Well, I have mentioned the fact that they have very poor security. I think that the lack of adequate management and oversight of the ADP operations has led to a situation where the Department has a great deal of information, very sensitive, that is subject to improper disclosure.

They have not been able to get on top of a lot of their collection activities. The Inspector General of Justice has issued a report on the FBI disclosing major weaknesses in the ADP operations of that component agency. I think that the kinds of things that spin from this poor management are very widespread within the Department.

Mr. BROOKS. In your report on the Immigration and Naturalization Service's ADP management, you noted there is a risk of admitting illegal aliens due to an inaccurate ADP data base. They just don't have account of what they're doing.

Mr. SOCOLAR. That's correct.

Mr. BROOKS. Given the poor track record of ADP management at the Department, should the Justice Management Division continue to have responsibility for this $2.7 billion in the next 5 years?

Mr. SOCOLAR. I think they've done a relatively poor job over the years, and I do think that a lot of the actual implementation of ADP operations could be dispersed throughout the component agencies. However, I would have to add that it's extremely important to have an overall centralized management and coordination with direction to those component organizations, as to what it is the Department will be seeking to achieve, what kinds of information it is necessary to collect to be able to perform the Department's missions.

Mr. BROOKS. Does the Department have a comprehensive 5-year plan, ADP plan, as required by the Paperwork Reduction Act?

Mr. SOCOLAR. The Department does have a plan, but I wouldn't say that it's one that is consistent with the Paperwork Reduction Act. The Paperwork Reduction Act requires a plan that will be able to serve as a blue print for where the agency is going in its information-gathering activities with regard to performing its essential missions. The plan that the Department has is little more than a collection of statistics with regard to the ADP procurements that are being planned for the future without that kind of coordination.

Mr. BROOKS. Does the GAO believe that the $200,000 payment made by the Department of Justice toward the settlement of the protest of the EAGLE procurement against Tisoft, Inc., was legal and proper?

Mr. SOCOLAR. We have a great deal of problem with that payment. We did an earlier report with regard to the settlements of protests that come before the GSBCA and our office and suggested in that report that some legislation might well be useful in the context of these kinds of payments.

Here we had, as you are aware, Mr. Chairman, a payment by the Department of Justice to the awardee of a contract that it itself was letting, that payment to serve as some assistance to the awardee in financing a settlement that it had made with unsuccessful offerors, who had protested——

Mr. BROOKS. Three.

Mr. SOCOLAR [continuing]. Three, and who had withdrawn their protests as a result of this settlement.

Mr. BROOKS. One of them withdrew it for $450,000 in a year; one of them withdrew it for $400,000, plus 2 percent of the gross paid by the Department under contract over its 8-year life, plus any renewal periods—that's a pretty slick contract—and one of them took $1,050,000 in payments within 1 year.

I wonder if the Government is going to pay for that out of the contract they gave to Tisoft. Why would they pay them off that much if that wasn't gravy in the contract? How could they do it if it was right out of their operating capital?

Mr. SOCOLAR. It is very troublesome.

Mr. BROOKS. Troublesome. Me, too.

I appreciate your concern about it. Without objection, I would insert the letter you sent me on this matter, dated August 31, 1990.

[The letter follows:]

Comptroller General
of the United States
Washington, D.C. 20548

B-239184

August 31, 1990

The Honorable Jack Brooks
Chairman, Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

In your March 19, 1990, letter you have asked our office to provide you with our views regarding the Department of Justice (DOJ) procurement of its Enhanced Automation for the Government Legal Environment (EAGLE). Specifically, you asked us to examine the propriety of a settlement agreement between the Department of Justice and the awardee, Tisoft, Inc. (Tisoft), which resulted from a June 1989 protest at the General Services Administration Board of Contract Appeals (Board) filed by Prime Computer, Inc. (Prime) against the award to Tisoft. You also asked us to comment on the propriety of the settlements between the private parties, including Tisoft's agreement to give one of the protesters a percentage share of all future revenues from the contract.

The protester, Prime, was an unsuccessful offeror for the EAGLE procurement. Prime alleged various violations of procurement statutes and regulations. It sought amendment of the solicitation and an opportunity to submit another proposal. The other unsuccessful offerors, Falcon Systems, Inc. and Systems Management American Corporation (SMA), joined Prime in the protest. Falcon later voluntarily withdrew its notice of intervention, leaving only Prime and SMA as protesters. Tisoft, as the awardee, was an intervenor-respondent with DOJ.

The day before the scheduled hearing both Prime and SMA filed motions requesting dismissal with prejudice, which the Board granted. The Board's order was silent as to any settlement between any of the parties.

The settlements between the various private parties involve sums of money which the awardee, Tisoft, agreed to pay the protesters. As your letter indicates, the total amount could be as much as $6 million depending on future revenues from the contract. To the extent that these agreements between private parties remain private and do not impair the contractor's ability to perform its contractual obligations to the government at the contract price, they violate no statute or regulation. Nevertheless, these settlements are troubling to

us. One of the primary purposes for the statutory establishment of the bid protest system was to use wrongfully excluded vendors to identify and obtain correction of violations of law and regulation. A cash payment by an awardee to settle a bid protest may help make the protester whole, but frustrates the statutory goal of correcting illegal agency action.

In addition to the settlements between the private parties, DOJ and Tisoft entered into a settlement in which DOJ agreed to pay Tisoft $200,000. This settlement is unusual as it is between litigants on the same side of a dispute whose contractual relationship has not been altered by litigation. The agreed settlement amount is the cost DOJ estimated it would spend in litigating the protest. DOJ understood that this amount would go toward Tisoft's payments to the other litigants even though the DOJ payment was unrelated to specific costs incurred by any of the other parties. Further, the settlement did not acknowledge the liability of any of the parties to the protest.

DOJ used its appropriation for "Legal Activity Office Automation," to pay the settlement with Tisoft. This program has been a line item in its budget since 1987, to procure ADPE for the agency. The appropriation is silent as to specific authority to pay for any costs or attorney's fees associated with litigation arising out of the various ADPE procurements.

Both the Board and GAO are subject to various constraints in awarding costs in a bid protest. Under the Brooks Act, the Board is empowered to declare a party is entitled to the costs of filing and pursuing the protest, including reasonable attorney's fees, and bid and proposal preparation costs whenever the Board determines that a challenged agency action violates a statute, regulation or the conditions of any delegation of procurement authority. 40 U.S.C. § 759(f)(5)(C) (1988). Pursuant to this authority the Board has held that it will not award a protester its costs of pursuing the protest unless it suffered a significant violation of law, regulation, or delegation of procurement authority or obtained some benefit promoting full and open competition as a result of the protested action. Bedford Computer Corp., GSBCA No. 9837-C (9742-P) (May 2, 1989), 1989 BPD ¶ 121. Moreover the Board will not award bid preparation costs unless the prevailing party also shows that such costs were essentially wasted in responding to the solicitation. Data/Ware Development, Inc., GSBCA No. 9945 (9792-P) (Feb. 15, 1990), 1990 BPD ¶ 47.

Similarly, under the Competition in Contracting Act, the Comptroller General is authorized to award the costs of filing and pursuing a protest and bid and proposal preparation costs where he determines that "a solicitation for a contract or a

proposed award or the award of a contract does not comply with a statute or regulation. . . ." 31 U.S.C. § 3554(c)(1)(1988); see Teknion, Inc., 67 Comp. Gen. 607 (1988).

In the instant case, there is no evidence that DOJ evaluated or even considered the merits of the protest in reaching its decision to settle. DOJ did not admit or allege in the settlement that it violated any statute or regulation; Tisoft intervened in the settlement on the side of DOJ and was simply defending its award. Moreover, the settlement agreement between DOJ and Tisoft contains no restriction on the manner in which the money to Tisoft is to be spent. Accordingly, Tisoft could allocate the money for attorney's fees, bid preparation costs or for any purpose it deems appropriate. Clearly such an agreement does not meet the test for the awarding of costs under either the Board or GAO precedent.

In GAO/GGD-90-13, ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed, we questioned the appropriateness of monetary settlements of protests before the GSBCA where the agency either thought the protest had no merit or chose not to correct procurement flaws that could be corrected, instead settling with money because it would take less time. In agreeing to pay Tisoft and tacitly approving the other agreements, DOJ appears to have bought off the other parties. In so doing, it has failed to serve the goals of economic and efficient procurement and has not fostered full and open competition.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

37-212 0 - 90 - 6

Mr. BROOKS. Mr. Socolar, I have a couple of other questions. I will leave them for you, or I will send them to you for you to fill out the details, if I might, sir.

Mr. SOCOLAR. I would be glad to respond, Mr. Chairman.

[Mr. Socolar's submissions to Mr. Brooks' questions for the record follow:]

Comptroller General
of the United States

Washington, D.C. 20548

December 17, 1990

The Honorable Jack Brooks
Chairman, Committee on the
Judiciary
House of Representatives

Dear Mr. Chairman:

This letter responds to questions raised in your letter of December 7, 1990 regarding our testimony of December 5, 1990, on Justice's ADP management and operations.

Question 1 What types of computer security deficiencies did GAO identify in its recent report on Justice computer security?

Our recent report focused on security programs in Justice's litigating organizations, which include 94 U.S. Attorney Offices and six divisions-Antitrust, Civil, Civil Rights, Criminal, Land and Natural Resources, and Tax.[1] We found that Justice was not ensuring that its highly sensitive computer systems were adequately protected. We identified many disturbing weaknesses in existing security which, if not corrected, could severely compromise both the computer systems and the sensitive information they process.

Within Justice's seven litigating organizations, we found that contingency plans necessary if services are disrupted either had not been prepared or were not tested, and that no mandatory computer security training was being provided for all employees.

Three of Justice's litigating organizations-the U.S. Attorney Offices and Criminal and Tax Divisions-have begun performing risk analyses that may not adequately assess computer security vulnerabilities and threats. A risk analysis is a critical step for ensuring that adequate security safeguards exist in these organizations. Justice performed its risk analyses using a software package that failed to evaluate the quality of controls such as whether adequate contingency plans existed.

[1]Justice Automation: Tighter Computer Security Needed (GAO/IMTEC-90-69, July 30, 1990).

Four other litigating organizations-the Antitrust, Civil, Civil Rights, and Land and Natural Resources Divisions-completed risk analyses during our review. Each of the analyses pointed out serious computer security vulnerabilities that need to be corrected. For example, the security vulnerabilities identified include a lack of provision for periodic audits and reviews of sensitive applications and periodic certifications as to the adequacy of security safeguards.

We also identified several material weaknesses in physical and other operational security at Justice's main data center in Rockville, Maryland. For example, access to the data center was not properly controlled, and software documentation and utility programs that could be used to bypass normal system security safeguards were available to all employees having access to the data center.

Question 2 Is it true that some senior managers in the Justice Management Division do not believe that a central case management system is needed at Justice?

On May 21, 1990 we met with the senior IRM official to obtain his views on the reasons for the Department's lack of progress in developing a departmental case management system. At that meeting the senior IRM official expressed skepticism about the need for such a system because he said the benefits of a departmental case management system had never been clearly articulated to him, he was uncertain as to who the users of the system would be, and each of the litigating divisions already had its own case management system.

Later in the review, this official agreed that such a system was needed. The senior IRM official stated that after discussing case management with the Attorney General and other Department officials, he reached the conclusion that a departmental case management system was necessary as a management tool.

- - - -

You also asked us to provide the Committee with written comments on the General Services Administration's Procurement and Management Review Report for the Department of Justice and the December 3, 1990 comments by the Department of Justice concerning the major findings of this report. Our response to this request will be provided under separate cover.

Sincerely,

Milton J. Socolar
Special Assistant to the
Comptroller General

Mr. BROOKS. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. We appreciate the work that the General Accounting Office does for this committee.

As you know, the FBI has an identification set of files on fingerprints that is central for the whole United States. You have been asked by my subcommittee to study their request and their plan, which is being implemented right now, without authorization I might add, to move the Ident Division with 3,000 employees out of downtown Washington, DC to West Virginia, where they will spend probably up to a billion dollars on a new fingerprint identification system and recordkeeping.

Are you cognizant of the investigation being made by the GAO in that regard?

Mr. SOCOLAR. I understand that we have been asked to look at that. It would be through our General Government Division. I can certainly check on that when I get back to the office.

Mr. EDWARDS. I would appreciate it. We are very interested in it. We want to be sure this money is being spent wisely. The testimony before my subcommittee was that the reason there are hundreds of thousands of unfiled fingerprint cards and dispositions sitting over there is that they were short of employees, 2,600 instead of the 3,200 they needed. For want of that, they are going to move it to West Virginia, where I presume they think they can get plenty of new employees.

Thank you.

Mr. SOCOLAR. I will certainly be in touch with you.

Mr. BROOKS. Mr. Campbell.

Mr. CAMPBELL. Thank you, Mr. Chairman.

Just briefly, Mr. Socolar, I commend your work. Please keep it up.

You mentioned in your testimony the debt collection procedures and the failures of ADP, a very important issue to me, one that will be before our Administrative Law Subcommittee. So please keep up your analysis on that subject. It will be of specific interest to me. I commend your work.

Thank you, Mr. Chairman.

Mr. SOCOLAR. Thank you.

Mr. BROOKS. This will conclude our hearing on the AG's refusal to provide congressional access to "privileged" INSLAW documents. That privileged is in quotes.

In my view, the Department's credibility and reputation have been greatly damaged by the shoddy way it has handled the INSLAW case and ADP contracting in general. The ADP management problems at the Justice Department have persisted for at least 12 years and have adversely affected important Justice programs. Yet the problems have been largely ignored by at least three Attorneys General.

Now the GAO tells us it is unlikely that the Department has the ADP technical and managerial talent to properly conduct and oversee the expenditure of some $2.7 billion for ADP improvement from 1991 to 1995. Clearly, a concerted effort by Attorney General Thornburgh himself is going to be urgently needed to turn this disastrous situation around.

As far as the INSLAW case is concerned, a good first step to resolving this issue would be for the Attorney General to reverse his position regarding our access to the contested INSLAW documents and allow the committee to look at them and professionally and objectively complete its investigation of this matter. I sincerely hope our differences can be amicably resolved, if possible. But I'm prepared to take whatever steps are necessary to compel the production of the requested material.

Without objection, the hearing record will be kept open to receive additional materials. The subcommittee hearing is adjourned.

[Whereupon, at 12:58 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.— CORRESPONDENCE BETWEEN THE COMMITTEE AND THE DEPARTMENT OF JUSTICE AND OTHERS RE: INSLAW CASE

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

December 4, 1990

Honorable Hamilton Fish, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D. C. 20515

Dear Congressman Fish:

This is to provide background information on the Department's cooperation with the Committee's investigation of our automated data processing (ADP) procurement practices, including Inslaw and Project Eagle. The investigation, which began in earnest in January of this year, has involved almost daily requests for access to Department employees, documents, and computer software. Some of the requests were directed to OLA and others arose during employee interviews. The Committee has been provided with access to hundreds of thousands of pages of material during the investigation.

Our activities in furthering the Committee's efforts may be summarized as follows:

1. We arranged for over 50 interviews by Committee staff with Department employees in JMD, Civil, Antitrust, Criminal, Lands, Tax, Civil Rights, EOUSA, several U.S. Attorney's offices, OJP, FBI and DEA. Employees were encouraged to cooperate in the interviews, in accordance with the Department's effort to cooperate in the investigation. As an additional accommodation to the Committee, the Department did not insist on its usual practice of having a Department representative at these interviews.

2. In order to accommodate the Committee staff, a room on the Department's 6th floor was reserved for them to review some of the more voluminous documents they requested. The Committee staff was provided with a key to the room and access to a copier for their convenience. Contract files pertaining to the Acumenics contract and heretofore confidential personnel files of present and former Department employees are examples of the material placed in that room.

3. Committee staff also was provided with access to voluminous Project Eagle files as well as additional information prepared for them about that contract. This constituted over 30 drawers of files as well as six 6-foot shelves of materials.

Additionally, we prepared for the staff information about case management systems throughout the Department, including litigating and non-litigating components such as the FBI, DEA, Bureau of Prisons, U.S. Marshals Service, and Interpol.

4. We sought and obtained a ruling from the Court in the Inslaw litigation to permit the Committee access to Inslaw's software. This resulted in the delivery of approximately 25 boxes of material to the Committee's offices in the Cannon HOB.

5. In addition to the Project Eagle and Inslaw contract files, we produced volumes of pre-award information relating to those and other contracts and offers.

6. We have provided access, pursuant to a confidentiality agreement, to the files reflecting investigations by the Office of Professional Responsibility, and we have provided documents generated during investigations by the Criminal Division into allegations of wrongdoing relating to Inslaw.

7. We have arranged for depositions of a number of Department employees by the Committee. In accordance with the Committee's position, these depositions have been conducted without the presence of Department counsel.

8. Finally, we have permitted unprecedented access to the Civil Division's files concerning the pending Inslaw litigation. These files consist of tens of thousands of documents -- of which we have withheld only a minute fraction, which are privileged attorney work product that would not be available to a party in litigation with the United States.

We would be pleased to brief the Committee concerning our position on withholding the litigation work product. As the above summary amply demonstrates, the Department is committed to allowing full investigation of its handling of the ADP procurements. However, Committee review of the withheld documents would not constitute an investigation of the handling of the procurements, but rather the Department's handling of the Inslaw litigation. Congressional investigations are justifiable only as a means of facilitating the task of passing legislation. Thus, the Committee is certainly entitled to inquire into the procurements because Congress can legislate concerning our procurement practices. On the other hand, Congress cannot legislate concerning the Department's discharge of the Executive's constitutional responsibility for enforcing the laws through litigation. We therefore question the Committee's need for documents that discuss litigation strategy and other aspects of our representation in the Inslaw litigation.

We have previously made clear our concern about the impact that release of these documents would have on our ability to

discharge our litigative responsibilities. These documents were all generated by or for the lawyers representing the United States in the pending suits. Providing the Committee with documents that are not discoverable in the ongoing civil litigation, and certainly the public use of that material by the Committee, could be construed as a waiver of our litigation privileges. Such a waiver would put the Government in a fundamentally unfair position in the litigation, because comparable communications by and among counsel for Inslaw are protected from disclosure to government lawyers.

We must invoke this basis for withholding internal work product whenever the litigation position of the Department would be put at risk by the disclosure of such documents to Congress. We have taken this same position in connection with a request from the Government Operations Committee for internal work product in the Government's procurement fraud suit against the Northrop Corporation.

We reiterate our commitment to accommodating the Committee's investigative interests to the fullest extent consistent with our responsibility to conduct civil litigation on behalf of the United States.

Sincerely,

W. Lee Rawls
Assistant Attorney General

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

August 4, 1989

The Honorable Richard L. Thornburgh
Attorney General
Department of Justice
Washington, D.C. 20530

Dear General:

The Committee has received allegations that high level Department officials conspired to force a software company named INSLAW into bankruptcy and liquidate its assets. Further, it has been alleged that these officials also arranged to have the company's primary software product, called PROMIS, transferred or bought by a rival company, called Hadron, Inc. Apparently, Hadron is owned by a close personal friend of former Attorney General Edwin Meese and, at the time of the INSLAW controversy, the Meese family had a financial interest in Hadron.

As incredible as all this sounds, it is my understanding that a Federal bankruptcy judge has already found much of the first allegation to be true. In his decision on the INSLAW bankruptcy, Judge Bason ruled that the Department "took, converted, and stole" INSLAW's proprietary software using "treachery, fraud, and deceit". The judge also severely criticized the decision by high level Department officials to "ignore the ethical improprieties" on the part of the Justice Department officials involved in the case. Despite these dramatic findings, the Department took no action against any of the officials cited by Judge Bason. In fact, Judge Bason was not reappointed when his term expired at the end of 1987. Almost immediately he was replaced by one of the Justice Department attorneys who had worked on the INSLAW case.

This whole matter is very troubling. INSLAW first encountered problems in its contract with the Department in 1982 over what was then considered relatively minor contracting issues. Inexplicably, the conflict ballooned into a major controversy between the company and the highest levels of the Justice Department, including at least two Assistant Attorneys General, a Deputy Attorney General and, perhaps, Attorney General Meese himself. After six years and two long court cases, the issue remains unresolved. Undoubtedly, millions of dollars have been spent on litigation and, more importantly, the Department's ADP modernization program has been set back as much as ten years.

In the meantime, it is my understanding that Justice has moved ahead with a $76 million ADP procurement called "Project Eagle". This acquisition is intended to provide the Department with a new office automation system which will have sufficient capacity to eventually support a new case management system similar to INSLAW's. As you may know, the INSLAW case management system is currently being used at 42 U.S. Attorneys' offices throughout the country. We have been informed that the Department is in the process of substantially upgrading the computer hardware at these locations to support the expanded use of the INSLAW system. Concerns have been raised that since the Project Eagle acquisition appears to be supporting the same requirement as the upgraded INSLAW system, there may be unnecessary and wasteful duplication occurring between the two projects. Other serious questions have been raised about the way the Department conducted the Project Eagle acquisition, including allegations that Justice officials had rigged the solicitation to favor an incumbent vendor and awarded a contract to that vendor even though two other companies had provided substantially lower prices.

In my view, the Department's credibility and reputation have been greatly damaged by the shoddy manner in which it has managed some of its ADP procurements. I believe it is essential that the allegations concerning INSLAW and Project Eagle be fully and independently investigated by the Committee. I hope that I can count on your full support in this undertaking. It would be extremely helpful if you would instruct agency officials to cooperate with our investigation and assure them that no one will be penalized in anyway for cooperating with the Committee. At the conclusion of the investigation, we can discuss what actions would need to be taken to resolve any problems that have been uncovered.

Thank you for your continued cooperation and support. With best wishes, I am

Sincerely,

JACK BROOKS
Chairman

Office of the Attorney General
Washington, D. C. 20530

August 21, 1989

Honorable Jack Brooks
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Jack:

Thank you very much for your August 4, 1989 letter praising the Department's defense of our participation in FTS 2000. When we discussed this matter during my appearance before the Committee in May, the dispute was before the General Services Board of Contract Appeals. At that time I assured you that we would vigorously defend the need for government wide participation in FTS 2000. It is always gratifying to be able to deliver on one's commitments, and the Board's decision in our favor was clear and unequivocal.

My pleasure in receiving this letter was somewhat diminished, however, by receipt on the same day of your letter concerning the Inslaw matter. As you know, most of the Inslaw allegations involve events that occurred prior to my tenure as Attorney General. Nevertheless, I have had an opportunity to review the matter and I feel qualified to comment on it.

I know that we both share a commitment to the principles of competition in contracting and fairness to vendors in the government procurement process. I think we both also recognize that it is the inevitable nature of any competitive business arrangement that it will engender disputes. In the normal case, such disputes can be seen in context, and resolved in an appropriate forum without impugning the character and motivations of the participants. The FTS 2000 protest is an example of such a fair and fairly resolved dispute. The Inslaw matter unfortunately has defied such resolution.

In 1982 Inslaw entered into a three-year contract with the Department under which Inslaw was to be paid more than $9 million to install public domain computer software in 22 of the larger offices of the United States Attorneys and was to create a word processor version of that software for installation in the remaining United States Attorneys' offices. In 1984, when it became apparent that Inslaw would be unable to comply with the terms of the word processor portion of the contract, the

Department exercised its right under the contract to terminate that segment of the agreement for the convenience of the Government. The remainder of the contract expired of its own terms shortly after Inslaw filed for bankruptcy in 1985. Even though Inslaw did not successfully install the computer software in any of the United States Attorneys' 74 smaller offices, it was paid virtually the entire contract price. As you can imagine, there are numerous contract disputes between the Department and Inslaw relating to the administration and termination of this contract. These disputes, which I would characterize as legitimate contract disputes, are before the appropriate Board of Contract Appeals. The Department has been attempting, over Inslaw's objections, to obtain a prompt resolution of these disputes before the Board.

Rather than pursue its legitimate disputes before the Board, Inslaw has found it profitable to spin multiple conspiracy theories and proffer them to whomever will listen. I recognize and agree that, if supported, the allegations recited by Inslaw in your letter would indeed raise serious oversight concerns for the Committee. On the other hand, however, I urge you to review some of the available information about Inslaw and its allegations before committing the resources of the Committee to a full-fledged investigation based upon unsubstantiated innuendoes.

It is in fact correct that former bankruptcy Judge Bason made findings adverse to the Department on different issues from those discussed in your letter. The Department has appealed the findings and jurisdiction of Judge Bason's ruling to the United States District Court for the District of Columbia, and I am sure that you would agree that the federal courts are the appropriate forums for resolution of that matter. I have no personal knowledge about the District of Columbia Circuit's decision not to appoint Judge Bason to a full term, but I urge you to consult Chief Judge Wald concerning the reasons for that decision.

Many of the Inslaw allegations recited in your letter were also brought to the attention of the Senate Permanent Committee on Investigations which conducted and completed an investigation of Inslaw's last round of unfounded allegations. While the Committee report has not yet been issued, I would suggest that you consult with Chairman Nunn and the Committee's investigative staff concerning their findings before you seek to plow ground already substantially explored.

Similarly, the allegations concerning Project Eagle should be largely put to rest by an ongoing and extensive study by the General Accounting Office of that procurement. While we will not be permitted to review the GAO report, we expect it to be issued in September to a member or committee of the House of Representatives. We fully expect from the nature of the GAO

review that the report will address both our requirements and procurement methodology regarding Project Eagle. Again, I am confident that the GAO report will give no support to the Inslaw allegations about this procurement, and I urge you to consult with the GAO before crediting the allegations with sufficient reliability to launch a full Judiciary Committee inquiry. The GAO Review is numbered IMTEC 510332. Joseph T. McDermott, Assistant Director for Information Management and Technology Division (275-5130), is familiar with this GAO review.

Also, the allegations concerning former Attorney General Meese and Hadron are, to the best of my knowledge, equally unsubstantiated. In this regard, I would suggest that your staff contact the Office of Government Ethics to review Mr. Meese's financial disclosure statements for his full period of government service. These should reveal any interest of Mr. Meese or his immediate family in Hadron. If no such interest is reported, you may wish to question your source concerning the basis for these allegations. As you may be aware, the Department's Office of Professional Responsibility ("OPR") investigated allegations of misconduct against various present and former employees of the Department arising out of the Inslaw matter. In each case, OPR found the allegations to be unsubstantiated. In addition, the Criminal Division investigated criminal allegations against certain present and former employees of the Department arising out of the Inslaw matter. In each case, prosecution was declined for lack of evidence.

Finally, you should be aware that attorneys for Inslaw have sent a letter to the Special Division of the United States Court of Appeals for the District of Columbia Circuit. In the letter, Inslaw's lawyers appear to be claiming that the court either should expand the prosecutorial jurisdiction of Independent Counsel James McKay or should appoint a new Independent Counsel to Investigate certain complaints by Inslaw. On July 10, 1989, the Department filed a memorandum in opposition to Inslaw's request. The court has not yet ruled on the matter.

In summary, I regret the fact that an unfounded and continuing stream of allegations by a disgruntled vendor can be repeated and accepted simply because the target is a federal Department and its employees. Nevertheless, I can pledge this Department's full cooperation with the Committee in this matter, and I have so instructed all concerned agency employees, with the understanding that we will have to make arrangements to protect any information, documents, or testimony that we may proffer to the Committee from interested vendors and litigants, including Inslaw. As indicated above, this matter is still in litigation

before the district court and a board of contract appeals. I am looking forward to the opportunity to work with you on this.

Sincerely,

Dick Thornburgh
Attorney General

cc: Honorable Hamilton Fish
Ranking Minority Member

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

September 29, 1989

Honorable Jack Brooks
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This confirms and furthers the conversations between members of our staffs about the Committee's interest in investigating the Department's handling of the Inslaw contract and the Project Eagle procurement.

In order to facilitate our reponse to your requests for information, we ask that Committee requests for interviews, documents, and other materials be particularized and transmitted in writing. This will minimize the possibility that any request may be overlooked or misunderstood. We also would appreciate receipt of each request sufficiently in advance of the date on which production is sought to permit a considered response. We are continuing to litigate matters relating to the Inslaw contract in both the Board of Contract Appeals and the U.S. District Court for the District of Columbia. Accordingly, our arrangements with the Committee may be affected by those proceedings.

As you may know, the Senate Permanent Subcommittee on Investigations has today issued a staff report on that Subcommittee's investigation of the Department's handling of the Inslaw contract and other matters, including the Project Eagle procurement. We understand that the Subcommittee has accumulated a substantial amount of evidence on these issues, much of it directly from this Department. We think that review, by your staff, of the staff report and the evidence provided to the Subcommittee may yield information that could save the Committee and this Department substantial resources. Indeed, your Committee may wish to reassess the need to commence another investigation until everyone involved has had an opportunity to review that information.

We appreciate your consideration of these concerns and look forward to working with you further on this matter.

Sincerely,

Carol T. Crawford
Assistant Attorney General

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

January 2, 1990

Ms. Susan Kuzma
Louisville School of Law
Belknap Campus
Louisville, Kentucky 40292

Dear Ms. Kuzma:

The Committee is investigating allegations that high level Department of Justice officials conspired to force a software company named Inslaw into bankruptcy. Specifically, the Committee received information that officials arranged to have the company's primary software product, called PROMIS, transferred or bought by a rival company, called Hadron, Inc. Apparently, Hadron is owned by a close personal friend of former Attorney General Edwin Meese. The Committee also learned that a Federal judge and several Department of Justice officials may have perjured themselves when asked to provide information on this matter.

As you may know, a Federal bankruptcy judge ruled in 1987 that the Justice Department "took, converted, and stole" Inslaw's proprietary software using "treachery, fraud, and deceit." The judge also severely criticized the decision by high level Department officials to "ignore the ethical improprieties" on the part of the Justice Department officials involved in the case. On November 22, 1989, a Federal district court judge upheld the bankruptcy judge's ruling that the Department acted willfully and fraudulently in attempting to obtain property that it was not entitled to.

It is my understanding that Committee investigators recently discussed the need for your cooperation in our investigation. The investigators requested a meeting with you to discuss issues relevant to the investigation including your involvement in the Inslaw case while you were an attorney with the Public Integrity Section of the Justice Department. You subsequently advised our investigators that you will not discuss the Inslaw matter with the Committee without the approval and involvement of the Department.

As I indicated earlier, the Committee is investigating very serious allegations of misconduct by a Federal judge and several officials of the Department of Justice. I would appreciate it if you would cooperate with the Committee by consenting to be interviewed by Committee investigators and provide them with all facts, data, or information relevant to the matters under investigation. You have the right to have an attorney who represents you at the interview. However, I cannot agree to allow officials of the agency which is under investigation by the Committee to be present at the meeting. I hope you understand the inherent conflict of interest this represents for the Justice Department. If you decline to cooperate, I would appreciate your providing the Committee with a full explanation of the legal basis for your decision. In the interest of resolving this matter as quickly as possible, I would appreciate an expeditious response to my request.

Sincerely,

JACK BROOKS
Chairman

Congress of the United States

House of Representatives

January 2, 1990

The Honorable Rudolph Giuliani
Case and White Lawyers
1155 Avenue of the Americas
New York, New York 10036

Dear Mr. Giuliani:

The Committee is investigating allegations that high level Department of Justice officials conspired to force a software company named Inslaw into bankruptcy. Specifically, the Committee received information that officials arranged to have the company's primary software product, called PROMIS, transferred or bought by a rival company, called Hadron, Inc. Apparently, Hadron is owned by a close personal friend of former Attorney General Edwin Meese. The Committee also learned that a Federal judge and several Department of Justice officials may have perjured themselves when asked to provide information on this matter.

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It is my understanding that Committee investigators recently discussed the need for your cooperation in our investigation with your assistant, Denny Young. The investigators requested a meeting with you to discuss issues relevant to the investigation and more specifically to the alleged perjury by a Federal judge. Mr. Young subsequently advised our investigators that you will not discuss any investigation, or consideration given to any possible investigation of the Inslaw matter by your office while you were the United States Attorney in the Southern District of New York.

As I indicated earlier, the Committee is investigating very serious allegations of misconduct by a Federal judge and several officials of the Department of Justice. I would appreciate it if you would cooperate with the Committee by consenting to be interviewed by Committee investigators and provide them with all facts, data, or information relevant to the matters under investigation. If you decline to cooperate, I would appreciate your providing the Committee with a full explanation of the legal basis for your decision. In the interest of resolving this matter as quickly as possible, I would appreciate an expeditious response to my request.

Sincerely,

JACK BROOKS
Chairman

ONE HUNDRED FIRST CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

January 9, 1990

The Honorable Dick Thornburgh
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

In a letter dated August 4, 1989, I informed you of my decision to initiate an investigation of the Department's handling of the Inslaw contract and the "Project Eagle" procurement. At that time, I requested that you instruct Department personnel to cooperate with our investigators and assure them that no one would be penalized in any way for assisting the Committee. Your support for this undertaking was confirmed in your August 21 letter by which you pledged the Department's full cooperation with the Committee in this matter.

Unfortunately, the promised cooperation has not materialized. Agency officials have refused to meet with Committee investigators. Even individuals who have left Justice are refusing to talk because they have been informed that the Departments wants to "speak with one voice" on these matters. In each of these cases, our investigators were diverted to your Office of Legislative Affairs (OLA) which appears to be trying to act as a central control point for all information given to the Committee. The investigators were told by OLA that they would not be given full and unrestricted access to agency files and individuals associated with the Inslaw and Eagle contracts. Instead, the office insisted that the Committee go through the cumbersome and lengthy process of putting all requests for documents, interviews and other materials in writing. Even then, Justice officials have indicated that access to pertinent information may not be granted because of pending litigation and "other considerations." Further, it is my understanding that with regard to interviews, Justice officials may require that a departmental attorney be present during any interview of Department employees. I could not devise any better way to preclude an investigative body from obtaining objective and candid information, on any matter, than by intimidating employees who otherwise may cooperate with an investigation. Certainly, the presence of a Department attorney will undercut our ability to interview, in an open, candid, and timely manner, departmental employees.

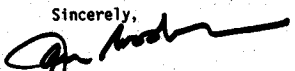
In a letter to me dated September 29, 1989, Ms. Carol Crawford, Assistant Attorney General for Legislative Affairs, reiterated the requirement that all Committee requests must be submitted in writing. She also suggested that the Committee should reassess the need for its investigation since the staff of the Senate Permanent Subcommittee on Investigations had recently completed an Inslaw and Project Eagle review.

I am deeply troubled by the continued lack of cooperation by departmental officials. The constraints placed on the Committee by Ms. Crawford and others have served to impede our investigation and to further undermine the Department's credibility in this matter. With regard to the Senate staff study, I am surprised that anyone at Justice would have the audacity to imply that the study was in any way an exoneration of the Department's management of the Inslaw and Eagle contracts. First, the Senate did not investigate the Department's handling of the Eagle contract. It merely reviewed the tangential question of whether Inslaw's problems with the Department were connected to the Eagle procurement. Second, the study was, in fact, highly critical of the way the Department allowed personal bias and a potential conflict of interest to become factors in the handling of the Inslaw matter. Finally, while the Senate staff study concluded that there was no evidence of a broad conspiracy within the Department to put Inslaw out of business for the personal gain of any individual, the study lambasted the Department for mishandling the case and failing to cooperate with the Senate investigation by refusing access to key documents and personnel.

In any case, this Committee is conducting an independent investigation separate from any study conducted by the Senate. To the extent possible, we will use the information contained in the Senate staff report and any available supporting materials to avoid unnecessary duplication of our efforts. However, since the Senate staff did not have access to all pertinent information within the Justice Department bearing on the Inslaw contract, I firmly believe that many important questions remain unanswered about the Department's role in this matter. I must therefore renew my request for immediate, full and unrestricted access to departmental employees, documents, and other such items, whether on page or in magnetic media, which relate to issues discussed in my August 4, 1989, letter. I know I can count on your pledge of the Department's full cooperation and support in this matter.

With best wishes, I am

Sincerely,



JACK BROOKS
Chairman

1155 AVENUE OF THE AMERICAS
NEW YORK

January 24, 1990

Honorable Jack Brooks
House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Mr. Chairman:

This is in response to your January 2 letter which I did not receive until mid-January. Let me assure you that I am anxious to assist you and your staff in any appropriate way. At the same time, I must also be mindful of my responsibilities to the Department of Justice and as an attorney.

Someone from your staff tried to contact me in November, 1989 asking about my knowledge of an alleged investigation or meeting concerning an investigation. Your staff member communicated with Dennison Young, Jr., formerly Deputy United States Attorney and now my law partner. Mr. Young explained that we would be willing to talk to the staff with the approval of the Department of Justice. He recommended that the staff discuss the matter with Department officials. We heard nothing further from your staff until I received your letter.

I am sending a copy of your letter to both the Department of Justice and the United States Attorney's Office for the Southern District of New York and asking them for advice. I am sure you appreciate that I must be concerned about the confidentiality of matters that allegedly came before me as United States Attorney. I am certain you would not want me to proceed without making certain that I am not in conflict with confidentiality requirements arising from my prior position, attorney-client privilege or other ethical constraints. If they have no objection, I would be happy to meet and discuss this matter

with your staff. In order to expedite this matter I will ask Department officials to contact your staff directly. Please be assured that I will do everything appropriate to comply with your request.

Sincerely,

Rudolph W. Giuliani

University of Louisville
School of Law
Louisville, KY 40292
19 January 1990

JAN 2[illegible] 1990

Hon. Jack Brooks
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515-6216

Dear Chairman Brooks;

This letter is in response to your letter of January 2, 1990, regarding an investigation that the Judiciary Committee is conducting relating to INSLAW, Inc. Your staff by telephone previously requested an interview with me, and I agreed to do so with certain provisions, including the provision that I be permitted to have someone present with me during the interview, particularly someone from the Department of Justice. I think it is important to spell out the context in which the Committee's request arises, so that the Committee can understand what my concerns were and are, and why any discussion about the circumstances under which an interview is conducted is necessary.

First, this is a novel experience for me; in my seven years as a prosecutor with the Justice Department, I was never called upon to be interviewed by a congressional committee concerning matters I worked on or knew about as a Department employee. Ordinarily, because my work involved giving legal advice and dealt most often with nonpublic information, I would not be discussing work matters with persons outside the Department. Indeed, a number of statutory or other restrictions would prevent me from doing so in many cases. Naturally, the initial concern I have, whenever I am asked to talk about such work-related matters, is whether it would even be permissible for me to do so. As I informed your staff, I had adopted a policy after I left the Department of uniformly denying requests to talk about nonpublic information relating to any matter I was involved with during my employment with the Department. This policy obviously eliminated the need to consider the propriety of particular disclosures.

When asked by your staff to make an exception to my policy, I encountered my second problem: I have no expertise in the area of disclosure to Congress of nonpublic information relating to case handling. To my knowledge, congressional requests for official Department information were, as a rule, made and responded to on an institutional, not an individual, basis. Though I claim no expertise in this area, I believe that the executive and legislative branches in the past have disagreed from time to time about disclosure of internal information.

Under these circumstances, I believed it imprudent, at the least, simply to provide information to the Committee without attempting to ascertain the limitations, if any, upon my doing so. Having the input of the Justice Department in the interview process seemed to me to be an expeditious way of allowing the interview to go forward while addressing my concerns, and to offer a number of advantages:

> 1. I would be assured that possible issues regarding the scope of permissible disclosure would be resolved, without my having to bear the risk of being wrong in interpreting the applicability of various statutes, regulations, or privileges;
>
> 2. I would be dealing with a person who was familiar with the subject matter of the interview and who knows me, eliminating the time-lag problem of involving another attorney unfamiliar with the situation;
>
> 3. I could at least request access to relevant documents to refresh my recollection prior to being interviewed; and
>
> 4. (At the risk of being mundane) it would avoid the expense of hiring private counsel.

Therefore, when I was orally informed that the Department would raise no objection to my being interviewed, and, in response to my request, that an attorney from the Department could accompany me to the interview, I felt this resolution would address my concerns.

In light of the Committee's refusal to allow me the opportunity to have a Department attorney present at the interview, I am in essentially the same situation of concern about limitations on my disclosure of nonpublic information as when I began. I understand that the Committee has an interest in pursuing its investigation and, if I can properly provide information to the Committee, I of course will do so. But I need to ensure that I would not be acting improperly in providing information in an interview. Therefore, I am writing to the Justice Department to request written confirmation that I may disclose nonpublic information to the Committee. Assuming no impediment to my disclosure to the Committee exists, I can arrange an interview with your staff.

As I previously discussed with your staff, I would not want to be interviewed by telephone, and I understand from your letter that I would be permitted to be represented by counsel (not an employee of the Justice Department) at the interview. It would be

my preference to have the interview recorded or transcribed. Finally, I would like to note for the Committee that it has been nearly two years since certain events about which the Committee might ask occurred, and one and one-half years since I left the Department. I have not had an opportunity to refresh my recollection by reviewing the relevant documents. To the extent that details one would not ordinarily commit to memory might be of interest to the Committee, I would hope the Committee will appreciate the limits of unrefreshed recollection.

When I receive confirmation from the Department, I will notify the Committee to arrange an interview.

Sincerely,

Susan M. Kuzma

Susan M. Kuzma

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

MAJORITY—225-3951
MINORITY—225-6906

January 31, 1990

The Honorable Dick Thornburgh
Attorney General of the United States
Washington, D.C. 20530

Dear Mr. Attorney General:

As I mentioned at our luncheon on Monday, I am seriously concerned about a number of recent positions taken by the Department of Justice regarding the Legislative Branch's access to information in the Department and in the Executive Branch generally. Persistence by the Department of Justice in limiting or obstructing Congressional access to Executive Branch information will undoubtedly lead to an unnecessarily confrontational relationship between the two branches.

I am particularly concerned about a communication signed by the then Assistant Attorney General for Legislative Affairs on September 8, 1989, addressed to the Chairmen of the House and Senate Committees on Armed Services, which had under consideration in conference the National Defense Authorization Act for Fiscal Years 1990 and 1991. In that letter, the Department expressed the opinion that both the House and Senate versions contained a number of constitutional defects. The Department's letter maintains that the President has the constitutional power "to withhold disclosures of information which would adversely affect the security of the United States." The letter further contends that "While Congress has a legitimate interest in much of the information it seeks in these reports, the President must be able to withhold any information that might divulge a state secret." With regard to providing information to Congress, the Department's opinion concludes:

> "This is not to suggest that the executive branch will not continue its current practice of sharing information with Congress. All Presidents have provided Congress with information concerning national security, and we have every reason to believe that this practice will continue. The President, however, must have the authority to determine what privileged information will be available to Congress and when such disclosure will occur."

These statements seem to me to be an abrupt and startling departure from well-established principles of law concerning Congressional access to information. It has long been established that Congress and the President share authority in the areas of foreign relations and national security. The Congress cannot possibly carry out its legitimate responsibilities in these areas should the President attempt to exercise exclusive determination of what information is made available and when it is delivered. I find it most

chilling that the Department would suggest that "The President must be able to withhold any information that might divulge a state secret."

At my request, the General Counsel to the Clerk of the House and his staff have analyzed the Department's arguments. The General Counsel's Memorandum asserts that "Contrary to the Department's contentions, the President possesses no authority under the Constitution to withhold national security information or state secrets from the Congress." Attached is a copy of the Memorandum.

Another matter that has recently come to my attention along this same line is the Department's unfavorable response to a request from Congressman Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights, for a copy of the opinion rendered by your Office of Legal Counsel concerning authority of the FBI to make extraterritorial arrests. There should be no question that this is a matter involving an extremely serious national policy to which both the Congress and the Executive Branch should give extremely careful consideration. No purpose is served by denying Congress access to all of the legal thought and analysis that have been directed to this issue, including that upon which the Justice Department relied in reaching its decision. I do not believe that it is either legally supportable or in the nation's best interests for the Justice Department to pick and choose which opinions of the Office of Legal Counsel are made available to the Congress. Indeed, it is my understanding that these opinions are published periodically. There is no justification for shielding them from Congressional access at the precise moment that critical decisions are being made.

In addition to the above, I am also concerned about the manner in which information is made available to the Committee in conducting our oversight investigations. As you know, we presently have under way a review of the Department's procurement of data processing services in Project Eagle and in the Inslaw matter. Despite repeated assurances of cooperation by the Department, we have continued to encounter delays and resistance in obtaining needed information.

I appreciate your personal commitment to improving the management of the Department of Justice, and I have every confidence that you will succeed in that effort. Good management is an essential element of good government, and you have a well-established and well-deserved reputation for insisting on both. I would implore you to personally revisit the issues mentioned above and to reevaluate the Department's response so that, together, we can continue to maintain a productive and cooperative relationship which recognizes the respective responsibilities of the two Branches under the Constitution as we enter our third century of government under that Constitution.

With best wishes, I am

Sincerely,

JACK BROOKS
Chairman

Enclosure

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

MAJORITY—225-3951
MINORITY—225-6906

February 7, 1990

Ms. Susan M. Kuzma
School of Law
University of Louisville
Louisville, Kentucky 40292

Dear Ms. Kuzma:

As I mentioned in my earlier letter, the Committee is investigating allegations that high level Department of Justice officials conspired to force a software company named Inslaw into bankruptcy. Specifically, the Committee received information that officials arranged to have the company's primary software product, called PROMIS, transferred or bought by a rival company, called Hadron, Inc. Apparently, Hadron is owned by a close personal friend of former Attorney General Edwin Meese. The Committee also learned that a Federal judge and several Department of Justice officials may have perjured themselves when asked to provide information on this matter.

Given the serious nature of the allegations under investigation, I am surprised by your refusal to cooperate with the Committee without the approval of the Justice Department. In my view, your suggestion that the Committee hold up its work until the Department provides you with a written approval is inappropriate. Our request for information was made directly to you and involves questions about actions you took, or chose not to take, in your capacity as a prosecutor for the Justice Department. The Department's decision in this matter would not be binding on the Committee and cannot shield you from our inquiry.

For your information, the Supreme Court has expressly confirmed Congress's authority to study "charges of misfeasance and nonfeasance in the Department of Justice." McGrain v. Daugherty, 273 U.S. 135, 151 (1927). The House Committee on the Judiciary exercises jurisdiction to investigate such charges, as part of its jurisdiction regarding "[j]udicial proceedings, civil and criminal generally," House Rule X(1)(m)(1). The Supreme Court has approved such Congressional investigation of "the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes . . . ." McGrain v. Daugherty, 273 U.S. at 151.

Your letter responded to our inquiries regarding the allegations of Justice Department misconduct in the Inslaw matter with a current refusal to cooperate, based on a perceived limitation you believe has been placed on Justice Department employees disclosing "nonpublic" information to Congress. As you may know, the Administration's own directives regarding withholding of such information from Congressional inquiries regulate such refusals to answer by the following standards. The Procedures Governing Responses to Congressional Requests for Information, issued by President Reagan on November 4, 1982, and continuing in effect, prescribe that "Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege." (Emphasis added.) You cannot withhold such information unless you assert the existence of such a "substantial question of executive privilege." Even with such an assertion, your information must be forthcoming unless the Justice Department speedily proceeds to obtain specific Presidential approval for claiming that privilege. No such claim of privilege has been made in the seven years since the collapse of the claim of executive privilege for Anne Gorsuch in 1983.

In any case, the Department recently informed the Committee that, since you are now a private citizen, it has no reason to attempt to intercede in this matter. Therefore, the question of whether you will cooperate with the Committee rests solely with you. Given that considerable time has elapsed since our original request to you for cooperation, I would appreciate an expeditious response to my inquiry.

Sincerely,

JACK BROOKS
Chairman

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

February 7, 1990

The Honorable Rudolph W. Giuliani
1155 Avenue of the Americas
New York, New York 10036

Dear Mr. Giuliani:

As I mentioned in my earlier letter, the Committee is investigating allegations that high level Department of Justice officials conspired to force a software company named Inslaw into bankruptcy. Specifically, the Committee received information that officials arranged to have the company's primary software product, called PROMIS, transferred or bought by a rival company, called Hadron, Inc. Apparently, Hadron is owned by a close personal friend of former Attorney General Edwin Meese. The Committee also learned that a Federal judge and several Department of Justice officials may have perjured themselves when asked to provide information on this matter.

Given the serious nature of the allegations under investigation, I am surprised by your refusal to cooperate with the Committee without the approval of the Justice Department. In my view, your suggestion that the Committee deal directly with the Department on this matter is inappropriate. Our request for information was made directly to you and involves questions about actions you took, or chose not to take, in your capacity as U.S. Attorney.

For your information, the Supreme Court has expressly confirmed Congress's authority to study "charges of misfeasance and nonfeasance in the Department of Justice." McGrain v. Daugherty, 273 U.S. 135, 151 (1927). The House Committee on the Judiciary exercises jurisdiction to investigate such charges, as part of its jurisdiction regarding "[j]udicial proceedings, civil and criminal generally," House Rule X(1)(m)(1). The Supreme Court has approved such Congressional investigation of "the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes . . . ." McGrain v. Daugherty, 273 U.S. at 151.

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Sincerely,

JACK BROOKS
Chairman

Office of the Attorney General
Washington, D. C. 20530

February 20, 1990

Honorable Jack Brooks
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

1989

Dear Mr. Chairman:

Thank you for your letter of January 31, 1989. I fully share your commitment to maintaining a productive and cooperative relationship which recognizes the responsibilities of our respective Branches. You express concern that certain recent actions by the Department may reflect a general effort to obstruct Congressional access to Executive Branch information. I want to assure you that this is not the case. We fully recognize that Congress, in carrying out its legislative responsibilities, has a legitimate need to obtain information from the Executive Branch. It has been, and will continue to be, our policy to seek to accommodate Congress' legitimate informational needs to the maximum extent possible.

Let me turn to the three specific issues you have raised, briefly describing the progress we have made on two of these, and then addressing the third in more detail.

1. We appreciate the importance of your Committee's review of the Project Eagle and the Inslaw matters, and we seek to cooperate fully. The Acting Assistant Attorney General for the Office of Legislative Affairs, Bruce Navarro, wrote you on February 14, 1990, suggesting procedures to facilitate the Committee's access to needed information. Please let me know if that response is in any way unsatisfactory.

2. I appreciate your willingness to consider a possible accommodation regarding the request for copies of the Office of Legal Counsel opinions on the overseas arrest authority of the FBI and the military. As you and I discussed on the telephone, I believe it is vital to the operation of all three Branches that internal legal advice be kept confidential. At the same time, I understand Congress' interest in ascertaining the legal positions that underlie Executive Branch policies and actions. After our conversation, the Assistant Attorney General for the Office of Legal Counsel met with Chairman Edwards, who indicated that he

would consider our proposal to provide him, in lieu of the opinions, a comprehensive written statement of the Department's legal position on these issues. I strongly believe that resolving this matter along these lines would be the best way to accommodate each other's interests.

3. The third issue that you raised does not relate to an actual instance of a Congressional information request, but instead to a legal position taken in a bill comment. In a September 8, 1989 letter to the House Armed Services Committee regarding the defense authorization bill, the Department stated the position that there may be occasions where, under the Constitution, the President must withhold information from Congress where necessary to protect the national security.

This statement was not intended to suggest that Congress should not receive national security information. You and I both know that, as a practical matter, the Executive Branch shares much national security information with Congress as a matter of course. Where disputes arise, a satisfactory accommodation can usually be reached, as in other areas. I expect and hope that this will continue to be the case.

Nevertheless, the statement in the bill comment does reflect the longstanding position of the Executive Branch that, as a matter of constitutional law, there may be cases where the President determines that a national security secret must be withheld from Congress because of the damage to the national security that might result from disclosure. This is by no means a new position. It is fair to say that this has been the consistent position of the Executive Branch since 1792, when President Washington and his chief cabinet officers (Hamilton and Jefferson) encountered Congress' first request for information.

The House of Representatives was then investigating the failure of General St. Clair's military expedition against the Indians. In connection with the investigation, Congress requested from the Executive Branch all "persons, papers, and records" pertaining to the St. Clair campaign. 2 Annals of Cong. 493 (1792). Secretary of State Jefferson's notes reflect that President Washington thereafter convened the Cabinet because it was the first request to the President for state secrets, and "he wished that so far as it should become a precedent, it should be rightly conducted." 1 The Writings of Thomas Jefferson 303 (A. Lipscomb ed. 1903). The President and the Cabinet concluded that "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." Id. at 304. The President ultimately decided to produce the requested documents. However, he directed Secretary Jefferson to negotiate an agreement with

Congress that acknowledged the President's right to protect state secrets, the public disclosure of which he determined could adversely affect national security. Jefferson's efforts were successful, and on April 4, 1792, the House resolved

> that the President of the United States be requested to cause the proper officers to lay before this House such papers of a public nature, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair.

3 Annals of Cong. 536 (1792) (emphasis added).

Thus, while President Washington accommodated Congress' interests, he explicitly reserved the right of the President to withhold national security information. Successive Presidents have consistently adhered to the position laid down by Washington, Hamilton and Jefferson,[1] and the Department of Justice has long articulated the position. For example, Chief Justice William Rehnquist, when he was the Assistant Attorney General for the Office of Legal Counsel, stated that "the President has the power to withhold from the Senate information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest."[2] This Administration will continue to adhere to this position.

Let me say that I am not sure it is useful for us to exchange volleys over competing legal theories on this issue. No concrete dispute over national security information is before us.

---

[1] See Memorandum for William French Smith, Attorney General of the United States, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, 6 Op. O.L.C. 751 (1982) (compiling historical examples of cases in which the President withheld from Congress information the release of which he determined could jeopardize national security).

[2] Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information 7 (Dec. 8, 1969). The Supreme Court has expressly recognized the President's constitutional authority to protect national security information. See Department of the Navy v. Egan, 484 U.S. 518, 527 (1988); New York Times Co. v. United States, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring); United States v. Nixon, 418 U.S. 683, 710 (1974).

What is important is that on a practical, day-to-day basis we are able to work out our differences in this sensitive area in good faith. Based on our relationship, I am confident we will be able to do so.

Sincerely,

Dick Thornburgh
Attorney General

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

MAJORITY—225-3951
MINORITY—225-6906

May 3, 1990

The Honorable Dick Thornburgh
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

This is with reference to our previous correspondence about the Committee's investigation of the Department's ADP procurement practices, particularly but not exclusively related to Inslaw and Project Eagle.

As Committee staff have verbally indicated, we request access to the personnel files and performance appraisals pertaining to former Attorney General Edwin Meese, former Deputy Attorneys General Arnold Burns and Lowell Jensen, Messrs. Cornelius Blackshear, Thomas Stanton, C. Madison Brewer, Anthony Pasciutto, Peter Videnicks, and William White. We also request access to the personnel files of Stephen Colgate, John Krause, Andrew Boots, plus Carol Rothgeb and Candace Olds. I have designated the Committee's chief investigator, Jim Lewin, to execute written requests for additional personnel files and personnel records during the Committee's investigation.

We also would like to review the financial disclosure froms for the above named individuals and others who may be identified during the investigation. The Committee staff will execute the appropriate forms for release of the financial disclosure forms.

Additionally, we request access to all contract and other procurement files related to Inslaw, Project Eagle, Acumenics, Hadron and Amicus including, but not limited to, the following: 1) Contract file for Modifications 3 through 8 to the Eagle contract; 2) Contracting officers' original price analyses of all vendors BAFO's; 3) Tisoft contract for AMICUS in 1986; and 4) 1987 rollover contract with Acumenics or Hadron for $40 million in computer based litigation support services for the Lands Division. Again, Mr. Lewin has been designated to request access to additional files as the investigation proceeds.

Lastly, we seek access to all documents in the Criminal Division and the Office of Professional Responsibility that relate to investigations concerning Inslaw and/or activities by Department employees related to Inslaw.

We realize that the requested documents contain sensitive information and appreciate your cooperation in making the documents available to the Committee.

Sincerely,

JACK BROOKS
Chairman

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 28, 1990

The Honorable Jack Brooks
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This memorializes the agreement between the Department of Justice and the Committee on the Judiciary concerning the Committee's request for certain documents in connection with its investigation of the Department's ADP procurement practices.

We recognize the Committee's investigative interests in this matter and appreciate the Committee's recognition of our confidentiality interests in these documents. Hence, we have agreed that the Committee will have copies of the documents for use in its investigation but the documents and their contents will not be released publicly by the Committee. The documents are as follows:

1. Report of the Department's Office of Professional Responsibility (OPR), dated March 31, 1989, to then Deputy Attorney General Harold G. Christensen, entitled "Report of Investigation of Allegations of Misconduct in the Inslaw Matter," and transcripts of interviews of certain individuals taken during the OPR investigation. The Report contains information furnished by individuals with the understanding that the information and the identities of such individuals would be kept confidential. This Report has been kept confidential within the Department and has been reviewed only by persons with a need for the information that it contains.

2. Inventories of Civil Division litigation files involving Inslaw, which detail the structure and depth of the Department's pending litigation. The Inventories describe the subject matter of the files, indicating the areas of investigation and research, as well as exchanges of information within the Department and the Executive Branch.

3. Indices of documents in the Civil Division's Inslaw litigation files that disclose the Civil Division's litigation strategy. These Indices identify the existence, and to some extent the content, of specific documents which are exempt from discovery in the pending law suits filed by Inslaw.

We look forward to continuing to work with you to facilitate the Committee's investigation.

Sincerely,

Bruce C. Navarro

Bruce C. Navarro
Acting Assistant Attorney General

Approved: _____
Committee on the Judiciary